# Petition

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No. 81 5562

(A-175)

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1981

FRED MARION GILREATH, JR.,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

JOHN R. HUPPER,
One Chase Manhattan Plaza,
New York, New York 10005
(212) 422-3000

Counsel for Petitioner

Of Counsel:

JEANNE EDNA THELWELL
STEPHEN M. BUNDY

CRAVATH, SWAINE & MOORE,
One Chase Manhattan Plaza,
New York, New York 10005

October 13, 1981

## QUESTIONS PRESENTED

In Gregg v. Georgia, 428 U.S. 153 (1976), this Court held that the death sentence may not constitutionally be imposed under procedures which create a "substantial risk that [the death penalty] would be inflicted in an arbitrary and capricious manner". 428 U.S. at 188 (opinion of Stewart, Powell & Stevens, JJ.). Under Georgia law, the sentencing jury may, but need not, impose the death sentence if it finds beyond a reasonable doubt that the offense of murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim". Ga. Code § 27-2534.1(b)(7) ("§ (b)(7)"). In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court concluded that sentencing instructions which do no more than repeat the language of § (b)(7) resulted in the "standardless and unchanneled imposition of the death penalty in the uncontrolled discretion of a basically uninstructed jury". 446 U.S. at 429 (Stewart, J.); id. at 437 (Marshall, J.). This case presents two important and recurring questions arising out of the Gregg and Godfrey holdings:

1. Whether a death sentence may constitutionally be imposed on the basis of a jury finding of a § (b)(7) aggravating circumstance when the jury was instructed concerning that circumstance essentially only in the vague language of the statute without any narrowing or clarifying construction?

2. Whether a death sentence imposed following a jury finding of a § (b)(7) aggravating circumstance

which resulted from a constitutionally defective charge may be affirmed on the ground that in imposing the sentence the jury may have relied upon a second aggravating circumstance (also not mandating the death sentence) as to which the charge was, arguendo, constitutionally proper?

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No. _____

In The

Supreme Court of the United States

October Term, 1981

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FRED MARION GILREATH, JR.,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner Fred Marion Gilreath, Jr., seeks a writ of certiorari to review the judgment of the Supreme Court of Georgia entered on June 30, 1981 (rehearing denied July 15, 1981).

PRIOR OPINIONS

The opinion of the Supreme Court of Georgia, which is reported at 247 Ga. 814, 279 S.E. 2d 650 (1981), appears at A. 01.*

JURISDICTION

The judgment of the Supreme Court of Georgia, entered on June 30, 1981, appears at A. 01. The court's order of July 15, 1981, denying a timely filed petition

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* References to the Appendix to this petition will be cited as "A. ".

for rehearing appears at A. 45. On August 28, 1981, petitioner applied pursuant to this Court's Rules 20.1 and 20.6 for an extension of time in which to file this petition for a writ of certiorari to and including October 13, 1981. A. 47-50. Justice Powell granted that application on August 31, 1981. A. 51. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case directly involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

This case also involves Ga. Code § 27-2534.1(b)(7), which provides:

> "In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> . . . .
>
> "(7) The offense of murder . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

The full text of these constitutional and statutory provisions and other relevant state statutory material appears at A. 52-57.

## STATEMENT OF THE CASE

Petitioner was tried, convicted and sentenced to death for the May 11, 1979 murders of his wife, Linda Van Leeuwen Gilreath, and her father, Gerrit Van Leeuwen.

The trial commenced on Monday, February 25, 1980, and concluded with death penalty verdicts at 11 p.m. on Friday, February 29, 1980. The evidence was voluminous (the trial court record is nearly 1500 pages long) and the jury sat well into the evening during the final three days of the trial.

1. The Guilt-Innocence Phase of the Trial

The evidence connecting petitioner to the killings was wholly circumstantial.

Petitioner and Mrs. Gilreath had been married for twelve years and had two children. (Tr. 1070, 1465.)* In the week before the killings they had several heated arguments. (Tr. 339-42, 419-25, 448-51, 1070.) During one such argument, petitioner pointed a gun at his wife. On May 9, 1979, Mrs. Gilreath moved from the Gilreath house to a trailer owned by her mother and stepfather, Grace and Dempsey Wolfenbarger. On May 11, 1979, an attorney retained by Mrs. Gilreath filed a petition for divorce. (Tr. 469.)

Petitioner had no prior criminal record, but had a history of alcohol problems. He had been drinking on the morning of May 11. (Tr. 1078, 1132.)** At approximately 12:30 p.m. on May 11, Mr. Van Leeuwen, who resided in a basement apartment at the Gilreath house, drove to the

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* The Transcript of Trial in State v. Gilreath is cited as "Tr. ".

** The trial judge reported to the Supreme Court of Georgia that in his opinion, Gilreath was "'dog-drunk'" on the day of the crime. Report of the Trial Judge, State v. Gilreath, at 4.

Wolfenbargers' trailer. Mr. Van Leeuwen told Mrs. Gilreath that petitioner wanted to speak to her about the pending divorce and to give her an opportunity to pick up some of her clothes. (Tr. 343.) Mr. Van Leeuwen and Mrs. Gilreath left the Wolfenbargers' trailer in a blue Plymouth Duster which belonged to the Gilreath family, sometime after 1:00 p.m., arriving at the Gilreath house shortly thereafter.

At approximately 1:40 p.m., three employees of the Cobb County Water Department who were clearing a water line across the street from the Gilreath residence heard what sounded like five shots fired in rapid succession from the vicinity of the house. (Tr. 504, 506, 507, 525.)* Two of the Cobb County Water Department employees testified that the blue Duster was parked in front of the Gilreath home at the time when they heard gunfire from the direction of the house. (Tr. 525-26, 549-50.)

The bodies of Mrs. Gilreath and Mr. Van Leeuwen were found in the Gilreaths' living room at approximately 5 p.m. on May 11. Mrs. Gilreath had been shot five times with a high-powered rifle and once in the head with a shotgun. (Tr. 905-06, 912-13.) Mr. Van Leeuwen had been shot once in the leg by a high-powered rifle, once in the chest with a shotgun and twice in the head with a .22 rifle. (Tr. 917-18.) Gasoline had been poured in the vicinity of the bodies and in the kitchen of the Gilreath house. (Tr. 787.)

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* The Gilreaths' next door neighbor also heard several shots fired in rapid succession at some time between 1:30 p.m. and 2:40 p.m. (Tr. 477-78.)

The Cobb County Medical Examiner testified that the position of the rifle wounds to Mrs. Gilreath's body indicated that they had been inflicted in rapid succession, probably in a matter of seconds. (Tr. 910.) The shotgun and .22 rounds were fired very shortly thereafter--again in "close succession". (Tr. 975.) Each of the shots fired at Mrs. Gilreath would by itself have been fatal, and tne shot to the head would have been instantly fatal. (Tr. 937, 943.) Each of the shots to Mr. Van Leeuwen's head and chest would have been fatal, and the shots to the head would have caused instant unconsciousness and rapid death. (Tr. 942, 944.)

A shotgun and a .22 rifle belonging to petitioner were recovered at the scene. (Tr. 787.) Shotgun and .22 shells found at the scene of the crime were matched with those weapons. A .30-.30 rifle belonging to the petitioner was missing from the house, but .30-.30 shells found at the scene were matched with shells found at a cabin owned by Mr. Gilreath in North Carolina. (Tr. 636-38, 819-20.)

Petitioner was arrested in Hendersonville, North Carolina, at his brother's place of business, at approximately 8 p.m. on May 11. Petitioner had driven the blue Duster from his home. According to the arresting officer, petitioner was intoxicated at the time of his arrest. (Tr. 668.) When petitioner was arrested, he had recently showered with his clothes on. (Tr. 658.) Analysis of petitioner's cut-off shorts suggested the possible presence of blood. (Tr. 615.)

Petitioner testified in his own defense and denied the crime. He stated that he had planned to travel to North Carolina at the end of the week. (Tr. 1075, 1118-19.) He further testified that he had left his house in the blue

Duster at 1:25 p.m., without speaking to his wife, in order to purchase liquor at a local store, and that after reaching the store, he decided to proceed immediately to North Carolina. (Tr. 1079.)

The jury retired to consider the evidence at approximately 7 p.m. Friday, February 29. At 9:15 p.m., following dinner, the jury returned a verdict of guilty on both counts of the indictment.

2. The Sentencing Phase of the Trial

The sentencing phase of the trial commenced immediately after the jury's verdict. Neither the State nor petitioner presented any further evidence. Attorneys for both sides argued to the jury.

As part of his sentencing instructions, the trial judge read to the jury the three statutory aggravating circumstances which the State contended were present in the case:

> (1) "The murder of Linda Van Leeuwen Gilreath was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind, and an aggravated battery to the victim." (Tr. 1298.)
>
> (2) "The murder of Gerrit Willem Van Leeuwen was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind and aggravated battery to the victim." (Tr. 1298.)
>
> (3) "The murder of Gerrit Willem Van Leeuwen was committed while the offender was engaged in the commission of another capital felony, to wit, the murder of Linda Van Leeuwen Gilreath." (Tr. 1298-99.) See Ga. Code § 27-2534.1(b)(2).

Apart from reciting the statutory definition of "aggravated battery"* the trial court's instructions did not elaborate

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* "A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body or by rendering a member of his body useless or by seriously disfiguring his body or a member thereof." (Tr. 1298.) See GA. CODE § 26-1305.

upon or attempt to explain the meaning of any of the terms mentioned in § (b)(7), nor did they contain a narrowing or limiting construction of that statutory language. (Tr. 1297-99.)*

The jury retired to deliberate at 10:15 p.m. Friday evening. At approximately 11:00 p.m. they returned a sentencing verdict, finding all three aggravating circumstances and imposing death sentences upon both counts of the indictment. (Tr. 1304-05.) Petitioner's timely motion for a new trial was denied.

3. The Opinion of the Supreme Court of Georgia

The Supreme Court of Georgia affirmed both death sentences.

In reviewing the conviction, the court held, inter alia, that petitioner's Federal and state law objections to the admission of evidence were without merit, that there was no error in the trial court's instructions to the jury, and that the evidence supported both verdicts of guilt beyond a reasonable doubt. 247 Ga. at 814-834, A. 01-34.

In reviewing the sentencing proceedings, the court held that petitioner's death sentence was not "imposed under the influence of passion, prejudice or any arbitrary factor", Ga. Code § 27-2537(c)(1), that the jury's findings of the statutory aggravating circumstances were supported by the evidence, Ga. Code § 27-2537(c)(2), and that the petitioner's sentence was not "excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant". Ga. Code § 27-2537(c)(3). 247 Ga. at

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* The charge of the court is reproduced in full at A. 58-63.

840-41, A. 43-46.

In apparent disregard of prior precedents, the court refused to consider on the merits petitioner's challenge to the sentencing instructions as unconstitutionally vague, on the ground that petitioner had failed to request "clarifying instructions" in the trial court. In addition, the court noted that the language of § (b)(7) consisted of "words of ordinary significance which require no explication with the exception of 'aggravated battery,'" and that the statutory definition of "aggravated battery" adequately clarified the meaning of that term. 247 Ga. at 835-36, A. 36-37. In contrast, the court did review petitioner's state law claim that the sentencing charge had erroneously suggested that the burden lay upon the defendant to disprove the existence of the statutory aggravating circumstances, despite the absence of any objection to, or request for clarification of, the relevant portion of the instructions in the trial court. 247 Ga. at 837-38, A. 38-39.

Responding to petitioner's claims that the evidence did not support the jury's findings of the § (b)(7) aggravating circumstance, or, in the alternative, that to construe § (b)(7) to apply to his conduct would render that statute unconstitutionally vague, the court held that the evidence would have permitted the jury to find that both victims had survived the first shots fired at them for some indeterminate amount of time, and might have remained conscious for all or part of that time. Moreover, the jury could have found that gasoline had been poured over the bodies, that the pilot light in the stove was on, and that petitioner had fled the scene expecting that the gasoline would ignite. 247 Ga. at

838-39, A. 40-41. This evidence, the court held, supported the jury's finding of the § (b)(7) aggravating circumstance as to each count of the indictment, and distinguished petitioner's case from Godfrey v. Georgia, 446 U.S. 420 (1980). The court also affirmed the jury's finding of the § (b)(2) aggravating circumstance. 247 Ga. at 836-37, A. 37-38.

Finally, the court compared petitioner's sentence with the sentences imposed in thirteen purportedly similar "domestic and multiple murder cases" in which death sentences had been imposed and affirmed. The court did not refer in its opinion to the facts of any homicide cases in which life sentences had been imposed. On the basis of that review, the court concluded that defendant's death sentence was "not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant". 247 Ga. at 840-42, A. 45.

## HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW*

The issue of the constitutionality of § (b)(7) as construed and applied in this case was raised by a timely motion for a new trial and was decided on the merits by the Supreme Court of Georgia. 247 Ga. at 838-39, A. 40-41.

The issue of the constitutional adequacy of the sentencing instructions relating to the § (b)(7) aggravating circumstance was raised in petitioner's timely motion for a

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* Not all of the Federal claims raised in petitioner's appeal to the Supreme Court of Georgia have been raised in this petition. Limitation of the claims presented on this application to those clearly within the scope of this Court's Rule 17 is not intended to be, and should not be viewed as, a waiver of petitioner's right to pursue in other forums Federal claims not raised in this petition. Fay v. Noia, 372 U.S. 391 (1963).

new trial. The Supreme Court of Georgia refused to consider that claim "because there was no request for clarifying instructions" at trial. 247 Ga. at 835-36, A. 37.

This holding marked the first time that the Supreme Court of Georgia has ever refused to review sentencing instructions in a capital case on the ground of counsel's failure to object to those instructions at trial.* Prior to this case, it was settled law in the Georgia Supreme Court that "in a death case the sentencing charge is so crucial to the outcome of the trial" that the court would review that charge even in state habeas corpus proceedings "whether objection was made in the trial or not". Stephens v. Hopper, 241 Ga. 596, 602, 247 S.E.2d 92, 96, cert. denied, 439 U.S. 991 (1978) (emphasis added). Accord, Berryhill v. Ricketts, 242 Ga. 447, 451, 249 S.E.2d 197, 200 (1978), cert. denied sub nom. Berryhill v. Zant, 441 U.S. 967 (1979). Following that holding the court has routinely considered the adequacy of jury sentencing instructions in death penalty cases both on direct appeal and on review of habeas corpus proceedings, despite the lack of any

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* This was not, however, the only questionable state law holding reached by the Georgia court in its determination to affirm petitioner's conviction and sentence. Petitioner was not present for the administration of the voir dire oath to the jury. Prior to this case, it had been settled law that a criminal defendant had a "legal right . . . to be present at all stages of his trial", Wilson v. State, 212 Ga. 73, 74, 90 S.E.2d 557, 558 (1955), that the trial included the administration of the oath to the jury panel selected to try the case, Gray v. State, 229 Ga. 808, 194 S.E.2d 479 (1972), and that violation of that right required reversal of the conviction. Wilson v. State, supra. Notwithstanding the clear import of that precedent, the Georgia Supreme Court held that the administration of the voir dire oath to the jury was not a "stage of the trial", and that the petitioner's presence was, therefore, not required. 247 Ga. at 824, A. 17-18.

objection or request for clarification in the trial court.* Indeed, in a case decided only one week before petitioner's, the Georgia court reversed a death sentence on the ground of error in the sentencing instructions, notwithstanding the failure of the defendant's trial counsel to object to those instructions. Zant v. Gaddis, 247 Ga. 717, 279 S.E.2d 219 (1981). None of these earlier cases was referred to in the Georgia Supreme Court's opinion in this case.

Even if this refusal to consider the merits of petitioner's claim represented the even-handed application

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* The rule of Stephens v. Hopper, supra, while announced in the context of a review of a denial of habeas corpus relief, applies a fortiori on direct appeal from the judgment of conviction and sentence, where considerations of finality are less compelling. Consistent with that analysis, the Supreme Court of Georgia has reviewed death penalty sentencing instructions on direct appeal in cases where this counsel's review of the trial court record indicates that no objection was made to those instructions. See, e.g., Godfrey v. State, 243 Ga. 302, 310-11, 253 S.E.2d 710, 718 (1979), rev'd in part, 446 U.S. 420 (1980); Johnson v. State, 242 Ga. 649, 655-56, 250 S.E.2d 394, 399 (1978); Stevens v. State, 242 Ga. 34, 39, 247 S.E.2d 838, 843 (1978), cert. denied, 449 U.S. 891 (1980); Alderman v. State, 241 Ga. 496, 512, 246 S.E.2d 642, 652, cert. denied, 439 U.S. 991 (1978); Bowen v. State, 241 Ga. 492, 495-96, 246 S.E.2d 322, 325 (1978), cert. denied, 446 U.S. 970 (1980); Morgan v. State, 241 Ga. 485, 488, 246 S.E.2d 198, 200 (1978), cert. denied, 441 U.S. 967 (1979); Spivey v. State, 241 Ga. 477, 479-81, 246 S.E.2d 288, 291-92, cert. denied, 439 U.S. 1039 (1978); Potts v. State, 241 Ga. 67, 77, 243 S.E.2d 510, 519 (1978); Fleming v. State, 240 Ga. 142, 146, 240 S.E.2d 37, 40 (1977), cert. denied, 444 U.S. 885 (1979). Indeed, review of death penalty sentencing instructions has been undertaken on direct appeal even in cases where the court has refused to consider objections to the guilt-innocence charge on the ground that counsel had waived such objections in the trial court. Hill v. State, 246 Ga. 402, 407-08, 271 S.E.2d 802, 809-10 (1980), cert. denied, 101 S. Ct. 2001 (1981). Counsel has discovered no reported case in which review of death penalty sentencing instructions was denied on the ground of waiver. Counsel for petitioner has obtained copies of the relevant portions of the trial record in each of the cited cases and is prepared to make them available should this Court so desire.

of a new rule of law, such "novelty in procedural requirements", without prior warning to litigants, could not thwart review in this Court of the Federal question raised by the vagueness of instructions to the sentencing jury. E.g., Barr v. City of Columbia, 378 U.S. 146, 149-50 (1964); NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 301 (1964); Wright v. Georgia, 373 U.S. 284, 291 (1963); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958).

In this case, there is also evidence that the Georgia court's refusal to consider petitioner's Federal challenge to the sentencing instructions was founded upon hostility to the Federal right asserted. For the court resolved on the merits petitioner's state law challenge to the very same instructions, without even mentioning the absence of an objection or request for clarifying instructions in the trial court. 247 Ga. at 837-38, A. 38-39. The invidious application of state procedural law to bar consideration of a Federal claim plainly renders the asserted state ground inadequate under even the most restrictive view of the doctrine of the "adequate and independent" state ground. See Williams v. Georgia, 349 U.S. 375, 399 (1955) (Clark, J., dissenting); cf. McKnett v. St. Louis & S.F. Ry. Co., 292 U.S. 230, 233-34 (1934).

## REASONS FOR GRANTING THE WRIT

The petitioner has been sentenced to death by a jury which was instructed in the language of Ga. Code § 27-2534.1(b)(7)--language which this Court has previously found to result in "[t]he standardless and unchanneled imposition of [the death sentence] in the uncontrolled

discretion of a basically uninstructed jury". Godfrey v. Georgia, supra, 446 U.S. at 429, 437. This practice creates a "substantial risk" that the death penalty will be "inflicted in an arbitrary and capricious manner" and is therefore barred by the Eighth and Fourteenth Amendments. Gregg v. Georgia, supra, 428 U.S. at 188.

The Georgia Supreme Court, which has the power to eliminate the unconstitutional flaws in the § (b)(7) sentencing instructions, has repeatedly refused to do so. The intervention of this Court is therefore required to preserve the constitutional integrity of the Georgia death penalty scheme.

1. THE VAGUE STATUTORY LANGUAGE OF § (b)(7) PROVIDES NO CHECK UPON THE DISCRETION OF THE SENTENCING JURY. SENTENCING INSTRUCTIONS WHICH DO NO MORE THAN TRACK THE LANGUAGE OF § (b)(7), WITHOUT ANY LIMITING OR CLARIFYING GLOSS, CREATE A CONSTITUTIONALLY UNACCEPTABLE RISK THAT THE DEATH PENALTY WILL BE IMPOSED IN AN ARBITRARY AND CAPRICIOUS FASHION.

The jury in this case was instructed at sentencing that it could impose a death sentence upon petitioner if it found beyond a reasonable doubt that the murders of Mrs. Gilreath or Mr. Van Leeuwen were "outrageously and wantonly vile, horrible and inhuman in that [they] involved torture, depravity of mind and an aggravated battery to the victim". The only explanation of this aggravating circumstance offered by the trial court was the statutory definition of aggravated battery. The jury found the § (b)(7) aggravating circumstance with respect to both murders, and imposed the death sentence on both counts of the indictment.

It would be difficult to imagine a plainer violation of the Eighth and Fourteenth Amendment standards established in Gregg and Godfrey. States who wish "to authorize

capital punishment [have] a constitutional responsibility . . . to define the crimes for which death may be the sentence in a way that obviates 'standardless sentencing discretion'". Godfrey v. Georgia, supra, 446 U.S. at 428 (quoting Gregg v. Georgia, supra, 428 U.S. at 195 n.47). To meet that responsibility the state must "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death'". Id.*

The language of § (b)(7), without clarifying or limiting instructions, utterly fails to meet this standard. "It is . . . arguable that any murder involves depravity of mind or an aggravated battery". Gregg v. Georgia, supra, 428 U.S. at 201 (opinion of Stewart, Powell & Stevens, JJ.). See also Godfrey v. Georgia, supra, 446 U.S. at 437 (Marshall, J., concurring) (words of statute "are hopelessly ambiguous and could be understood to apply to any murder"). This Court has previously found that instructions which go no further than the language of § (b)(7) in clarifying the legislative purpose and guiding the jury's decision result in "[t]he standardless and unchanneled imposition of [the death sentence] in the uncontrolled discretion of a basically uninstructed jury". Godfrey v. Georgia, supra, 446 U.S. at 429; accord, id. at 437 (Marshall, J.).

The flaws which prompted this assessment are

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* The first internal quotation is from Gregg v. Georgia, supra, 428 U.S. at 198; the second is from Proffitt v. Florida, 428 U.S. 242, 253 (1976) (opinion of Stewart, Powell & Stevens, JJ.); the third is from Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (opinion of Stewart, Powell & Stevens, JJ.).

apparent on the face of the statute.

First, the statutory definition of "aggravated battery" fails to provide the sentencing jury with any meaningful guidance in identifying a discrete class of criminals or crimes deserving of the death penalty. "Aggravated battery" occurs when the offender "maliciously" destroys or renders useless a member of the victim's body, or "seriously disfigures" the victim's body or a member thereof. See Ga. Code § 26-1305. In every first degree murder, however, the jury must find express or implied "malice" beyond a reasonable doubt during the trial on the issue of guilt or innocence. And in many (if not most) cases, wounds sufficiently serious to cause death will also cause disabling or disfiguring injury. The statutory language does not define the "malice" required to sustain the finding of "aggravated battery"; it does not distinguish such "malice" from the "malice" required to sustain the murder conviction; it does not state that the acts constituting "aggravated battery" must occur before death; and it does not make clear that "aggravated battery" may not be shown simply by disabling or disfiguring injury causing death. See Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied, 101 S.Ct. 796 (1980). The statute on its face thus invites the jury to find an "aggravating" circumstance and to impose the death sentence, based on nothing more than the fact that a "malice" murder has taken place.

Second, the statute does not define "depravity of mind", nor does it explain to the jury how this antique common law term is to be applied to the facts of the crime before it. The Georgia cases indicate that "depravity of mind" is a term not readily understood by modern juries. In

at least two reported cases, the jury has requested further instruction concerning the meaning of the statute.* In one of those cases, the judge was unable to define the term correctly.** Indeed, in several reported cases the judge has charged or the jury has found an aggravating circumstance based upon "depravity of mind to the victim", a term whose meaning is as doubtful as its syntax.† Moreover, even if juries could be counted on readily to grasp and faithfully to apply the meaning of the statute, there would be no reason to assume that the statutory language in fact imposes any meaningful restraint upon their discretion, for as this Court has previously noted, "[i]t is . . . arguable that any murder involves depravity of mind". Gregg v. Georgia, supra, 428 U.S. at 201.

Simply put, the language of § (b)(7) does not of itself provide any meaningful guidance to the jury in its determination whether the death penalty should--or should not--be imposed. The vice of instructions which simply parrot the statutory language is twofold. First, ambiguous instructions may cause the jury, whose members "will have had little, if any, previous experience in sentencing", †† to view itself as permitted, or worse still compelled, to

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* Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981); Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938 (1980).

** Gates v. State, supra.

† See Tyler v. State, 247 Ga. 119, 274 S.E.2d 549 (1981); Brooks v. State, 244 Ga. 574, 261 S.E.2d 379, vacated and remanded, 446 U.S. 961 (1980), reaff'd, 246 Ga. 262, 271 S.E.2d 172 (1980), cert. denied sub nom. Davis v. Georgia, 101 S. Ct. 2000 (1981).

†† Gregg v. Georgia, supra, 428 U.S. at 192.

impose a sentence of death based upon nothing more than its sense that the defendant's conduct was violent or morally reprehensible. They thus create a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . [a] risk [that] is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments". Lockett v. Ohio, 438 U.S. 586, 605 (1978). Second, even when they do not operate to the disadvantage of a particular defendant, vague jury instructions invite--if they do not assure--different sentencing dispositions in similarly situated cases, thereby injecting an unnecessary, and hence unacceptable, degree of arbitrariness into the sentencing process. Beck v. Alabama, 447 U.S. 625, 642-43 (1980).

This case illustrates both of those vices. The petitioner had no prior criminal record, had recently become estranged from his wife, and had been drinking on the day of the crime. The jury found that he fired a series of shots in "close succession" at his wife and father-in-law. All but one shot was fatal, and several were instantly so. On one very powerful reading of the evidence, then, the crime was a hasty and drunken assault growing out of a domestic quarrel. In no meaningful sense can these facts be said to reflect "torture". Only on the most strained construction of the statute can they be viewed as demonstrating an "aggravated battery", independent of the murder itself, or "depravity of mind". In many similar domestic and multiple homicide cases since 1970 involving facts more "aggravated" than those presented here, Georgia judges and juries have imposed life sentences after the prosecution has requested the death

penalty.* There thus appears to be a substantial risk that the jury may have found a § (b)(7) aggravating circumstance, and imposed a death sentence on the basis of that finding,

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* In the vast majority of "domestic" cases (counsel's best estimate is 90%) the death penalty is not sought. Domestic cases involving aggravated facts in which a life sentence was imposed despite the prosecutor's request for the death penalty on § (b)(7) grounds include: Williams v. State, 243 Ga. 531, 255 S.E.2d 51 (1979) (victim stabbed and beaten to death); Flury v. State, 237 Ga. 273, 227 S.E.2d 325 (1976) (defendant shot wife several times, one wound fatal); Crowder v. State, 237 Ga. 141, 227 S.E.2d 230 (1976) (defendant murdered wife with an axe); Edwards v. State, 236 Ga. 486, 224 S.E.2d 361 (1976) (defendant repeatedly shot wife in the head); Owens v. State, 233 Ga. 905, 213 S.E.2d 860 (1975) (defendant set fire to his wife); Rampley v. State, 235 Ga. 101, 218 S.E.2d 838 (1975) (defendant beat three-month old daughter to death); Allanson v. State, 235 Ga. 584, 221 S.E.2d 3 (1975), cert. denied, 425 U.S. 937 (1976) (defendant killed parents, multiple gunshot wounds).

In addition, in numerous "non-domestic" cases involving multiple wounds and multiple victims--in which the case for imposition of the death penalty would appear to be even stronger than in the domestic context--juries have refused the prosecutor's request for the death penalty. See, e.g., Jordan v. State, 247 Ga. 328, 276 S.E.2d 224 (1981) (50 stab wounds); Banks v. State, 246 Ga. 178, 269 S.E.2d 450 (1980) (multiple gunshot wounds); Whitaker v. State, 246 Ga. 163, 269 S.E.2d 436 (1980) (multiple wounds); Ross v. State, 245 Ga. 173, 263 S.E.2d 913 (1980) (multiple wounds); Patterson v. State, 239 Ga. 409, 238 S.E.2d 2 (1977) (multiple victims, multiple wounds); Henry v. State, 238 Ga. 615, 234 S.E.2d 535 (1977) (multiple wounds, victim begged for his life); Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (1977) (one victim decapitated, second stabbed 11 times); Lingerfelt v. State, 238 Ga. 355, 233 S.E.2d 356 (1977) (two victims, multiple bullet wounds, arson); Porter v. State, 237 Ga. 580, 229 S.E.2d 384 (1976), cert. denied, 430 U.S. 956 (1977) (65 stab wounds); Graham v. State, 236 Ga. 378, 223 S.E.2d 803 (1976) (torture, multiple stab wounds); Brown v. State, 236 Ga. 333, 223 S.E.2d 642 (1976) (strangling, lengthy criminal record); Wilson v. State, 235 Ga. 470, 219 S.E.2d 756 (1975) (beating with hammer); Sanders v. State, 235 Ga. 425, 219 S.E.2d 768 (1975), cert. denied, 425 U.S. 976 (1976) (rape and beating prior to death); Stamper v. State, 235 Ga. 165, 219 S.E.2d 140 (1975) (three-year old child beaten to death); English v. State, 234 Ga. 602, 216 S.E.2d 851 (1975) (multiple gunshot wounds); Lerch v. State, 234 Ga. 857, 218 S.E.2d 571 (1975) (victim beaten to death with hammer); Brooks v. State, 233 Ga. 524, 212 S.E.2d 355 (1975) (78-year old woman beaten and stabbed); Echols v. (footnote continued)

in the belief that they were authorized to do so based upon nothing more than the fact that petitioner's conduct was reprehensible. If that was their belief, there was nothing in the court's instructions to prevent them from doing so. The fact that the sentencing instructions were given at 10:00 p.m. on a Friday night, after nearly 50 hours of trial spread over five days, can only have increased the likelihood of confused or irrational action by the jury during its 45 minutes of deliberation.

2. THE LIMITED APPELLATE REVIEW PERFORMED BY THE GEORGIA SUPREME COURT IS INADEQUATE TO ELIMINATE THE RISK THAT UNCONSTITUTIONAL JURY INSTRUCTIONS IMPERMISSIBLY INFLUENCED THE JURY'S SENTENCING VERDICT.

Appellate review of the sentence cannot render harmless a jury finding of a § (b)(7) aggravating circumstance which was based upon unconstitutionally vague sentencing instructions. Where the possibility remains that correction of constitutional error in the trial court may cause the sentencer to return a life sentence, that possi-

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v. State, 231 Ga. 633, 203 S.E.2d 165 (1974) (rape, stabbing).

In a number of reported life sentence appeals, the facts of the crime are not stated in the opinion. In all such cases, counsel for petitioner has sought additional information regarding the facts of the case. In cases decided after January 1, 1977, counsel has reviewed the briefs and trial record on file with the Supreme Court of Georgia. For cases decided prior to January 1, 1977, petitioner's counsel has reviewed the Reports of the Trial Judge filed with the Supreme Court of Georgia in all death sentence appeals, and similar reports prepared for the Georgia Supreme Court's use in life sentence appeals. The life sentence reports are not ordinarily part of the public record, but copies for the period January 1, 1970 to December 31, 1976, were produced by the State of Georgia during the course of the litigation which culminated in this Court's denial of certiorari in McCorquodale v. Stynchcombe, 434 U.S. 975 (1977). Counsel for petitioner has obtained copies of these Reports, and will make them available to this Court upon request.

bility requires de novo reconsideration of the sentencing question upon an untainted record. Gardner v. Florida, 430 U.S. 349, 362 (1977).

Assuming arguendo that such reconsideration on the full record by the Georgia Supreme Court could substitute for the opportunity to be heard by the initial sentencing authority upon a constitutionally untainted record, the limited review in fact undertaken by the Georgia court--as exemplified by the facts of this case--could not serve that purpose. As practiced by the Georgia Supreme Court, that review has two aspects: (1) determining whether the evidence supports the jury's finding of aggravating circumstances and (2) comparing the case to other cases in which the death sentence was imposed and affirmed in order to determine whether the sentence imposed in the case under review is disproportionate to those imposed in similar cases.

In Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied, 101 S.Ct. 796 (1980), decided shortly after, and in apparent response to, this Court's decision in Godfrey, the Supreme Court of Georgia parsed the language of § (b)(7) to identify three classes of evidence, each of which is independently sufficient to support a jury finding of a § (b)(7) aggravating circumstance: (1) evidence of physical or sexual abuse to the victim, occurring before or after death, but independent of the act causing instantaneous death; (2) evidence of serious psychological abuse before death; and (3) evidence of the age and physical characteristics

of the victim. 245 Ga. at 861, 268 S.E.2d at 345-46.* It would seem that this "construction" would permit the imposition of the death sentence under § (b)(7) in every case except the killing of a healthy adult, without forewarning, with a single shot or blow. In view of the sweep of the Hance construction, it is not surprising that in every case since Hance in which the issue has arisen the Georgia Supreme Court has found sufficient evidence in the record to sustain a jury finding of a § (b)(7) aggravating circumstance.**

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* A fuller analysis of the Hance opinion is as follows:

> 1. "Aggravated battery" is defined in the language of Ga. Code § 26-1305: "maliciously causing bodily harm to another by depriving him of a part of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof". The injury must occur before death. 245 Ga. at 861, 268 S.E.2d at 345.
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> 2. "Torture" may be shown by "serious physical abuse" before death (including "serious sexual abuse"), [causing] "severe mental anguish [to the victim] in anticipation of physical harm", or evidence sufficient to support a finding of "aggravated battery". Id.
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> 3. "Depravity of mind" may be shown by evidence of abuse sufficient to support a finding of "aggravated battery" or "torture" before death or a finding that the defendant mutilated or sexually abused the corpse after death. 245 Ga. at 862, 268 S.E.2d at 345-46. If there is dispute as to when the mutilation or sexual abuse occurred, the aggravating circumstance may be sustained on any of the three statutory grounds. 245 Ga. at 862, 268 S.E.2d at 346. "Depravity of mind" may also be shown by reference to the age and physical characteristics of the victims. Id.
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> 4. The statutory aggravating circumstance does not reach cases in which the victim died "instantaneously" and with "little or no forewarning". The facts showing the § (b)(7) aggravating circumstance must be separate from the act causing instantaneous death. 245 Ga. at 862, 268 S.E.2d at 345-46.

** Cervi v. State, No. 37316 (Ga. Sup. Ct. Sept. 29, 1981); Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981); Stevens v. State, 247 Ga. 698, 273 S.E.2d 398 (1981); Justus v. State, 247 Ga. 276, 276 S.E.2d 242, cert. denied, No. 80-6844 (footnote continued)

The Hance construction appears to bring the majority of intentional killings within the scope of § (b)(7). It is therefore doubtful that it provides a constitutionally adequate basis for distinguishing "'the few cases in which [the death penalty] is imposed from the many cases in which it is not'". Godfrey v. Georgia, supra, 446 U.S. at 427.

More important for this case, application of the Hance construction on appeal plainly does nothing to screen out cases in which the inadequacy of the § (b)(7) sentencing instructions led to the imposition of an extreme or irrational death sentence by "an essentially uninstructed jury". Moreover, because this "limiting" construction is never presented to the jury, it cannot fairly be said to

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(October 5, 1981); Thomas v. State, 247 Ga. 233, 275 S.E.2d 318 (1981); Hardy v. State, 247 Ga. 235, 275 S.E.2d 319 (1981); Messer v. State, 247 Ga. 316, 276 S.E.2d 15 (1981); Brown v. State, 247 Ga. 298, 275 S.E.2d 52, cert. denied, No. 80-6839 (October 5, 1981); High v. State, 247 Ga. 289, 276 S.E.2d 5 (1981); Tyler v. State, 247 Ga. 119, 274 S.E.2d 549 (1981); Strickland v. State, 247 Ga. 219, 275 S.E.2d 29, cert. denied, No. 80-6786 (October 5, 1981); Nelson v. State, 247 Ga. 172, 274 S.E.2d 317 (1981); Solomon v. State, 247 Ga. 27, 277 S.E.2d 1 (1980), cert. denied, 101 S.Ct. 2348 (1981); Cape v. State, 246 Ga. 520, 272 S.E.2d 487 (1980), cert. denied, 101 S.Ct. 956 (1981); Green v. State, 246 Ga. 598, 272 S.E.2d 475 (1980), cert. denied, 101 S.Ct. 1402 (1981); Hill v. State, 246 Ga. 402, 271 S.E.2d 802 (1980), cert. denied, 101 S.Ct. 2001 (1981); Davis v. State and Spraggins v. State, 246 Ga. 432, 271 S.E.2d 828 (1980), cert. denied, 101 S.Ct. 2000 (1981); Baker v. State, 246 Ga. 259, 272 S.E.2d 61 (1980), cert. denied, 101 S.Ct. 1402 (1981); Collins v. State, 246 Ga. 261, 271 S.E.2d 352 (1980), cert. denied, 101 S.Ct. 900 (1981); Brooks v. State, 246 Ga. 262, 271 S.E.2d 172 (1980), cert. denied sub nom. Davis v. Georgia, 101 S.Ct. 2000 (1981); Hamilton v. State, 246 Ga. 264, 271 S.E.2d 173 (1980), cert. denied, 101 S.Ct. 900 (1981); Dampier v. State, 245 Ga. 427, 265 S.E.2d 565, addendum, 245 Ga. 882, 268 S.E.2d 349, cert. denied, 449 U.S. 938 (1980). In Patrick v. State, 247 Ga. 168, 274 S.E.2d 570 (1981), the Georgia Supreme Court reversed the § (b)(7) finding on other grounds, but expressly noted the presence in the record of sufficient evidence to support such a finding.

have actually limited their exercise of sentencing discretion at trial. The most that can be said on the basis of a Hance affirmance is that if the jury had been constitutionally instructed, it might properly have rendered a § (b)(7) finding based upon that construction. But review under the Hance standard cannot reduce the possibility that the trial court's instructions to the jury permitted or encouraged it to impose the death penalty on the basis of other vaguer (and unconstitutional) notions of culpability. These failures are exacerbated by the Georgia Supreme Court's tendency to stretch the language in Hance to affirm § (b)(7) findings in cases where the evidence of aggravated battery or depravity was tenuous on any interpretation of the statute.*

Nor is the risk of unconstitutional arbitrariness reduced by the review performed by the Georgia Supreme Court to determine that the sentence imposed is not disproportionate to that received by comparable offenders. This Court anticipated in Gregg that such a review would "substantially [eliminate] the possibility that a person will be sentenced to die by the action of an aberrant jury". 428 U.S. at 206 (opinion of Stewart, Powell & Stevens, JJ.). But as the facts of this case illustrate, proportionality review has failed to meet that promise.

On any reasoned view of the evidence, petitioner's case was a domestic murder, in which alcohol and the strain

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* In a number of reported § (b)(7) cases the only aggravating circumstance shown was the presence of multiple gunshots, an element that is present in numerous killings. See, e.g., Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981); Mulligan v. State, 245 Ga. 266, 264 S.E.2d 204, addendum, 245 Ga. 881, 268 S.E.2d 351, cert. denied, 449 U.S. 986 (1980).

of marital breakup led to sudden and terrible violence. Each year the Georgia Supreme Court hears numerous appeals in such domestic murder cases.* Almost invariably in such cases a life sentence has been imposed in the trial court, often after the prosecution has requested the death penalty.** The facts of these cases were fully available to the Georgia Supreme Court, and surely any rational attempt to compare petitioner's sentence with those "in similar cases considering the crime and the defendant" would have focused, at least in part, upon those cases. But not one case of this kind was cited in the Georgia Supreme Court's proportionality review. Instead, the court cited six "similar" domestic murder cases in which the death penalty was imposed. Those cases were:

> 1. Sirmans v. State, 229 Ga. 743, 194 S.E.2d 476 (1972). In this pre-Furman case the defendant killed his wife with a single pistol shot after a domestic quarrel. Defendant's death sentence was vacated in light of Furman. Plainly the death sentence in Sirmans could not constitutionally have been imposed under the current Georgia statutory scheme.
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> 2. Strickland v. State, 247 Ga. 219, 275 S.E. 2d 29, cert. denied, No. 80-6786 (October 5, 1981). Although the Gilreath court viewed this as a domestic case, in Strickland, decided only four months before Gilreath, the very same court--seeking to distinguish Strickland from Godfrey--stated: "the homicides in the present case did not arise out of a husband-wife domestic dispute". 275 S.E.2d at 40 (emphasis added). The Gilreath court did not explain its sudden redrawing of the relevant classification. In Strickland, the defendant murdered three members of his girlfriend's family (severely mutilating one of them) and wounded two others as part of a "depraved" scheme to punish her. He also grotesquely mutilated his girlfriend, but made sure that she remained alive to suffer the full measure of her "punishment". The defendant was sober and had planned the murder.

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* Counsel estimates that from January 1, 1977, until the present, the Georgia Supreme Court has heard appeals in 53 cases which might fairly be characterized as "domestic" homicide cases.

** See cases cited at pp. 18-19 n.* supra.

3. Tyler v. State, 247 Ga. 119, 274 S.E.2d 549 (1981), in which the defendant repeatedly poisoned her husband with rat poison over a three-month period, each time causing him considerable agony, in order to obtain his life insurance money.

4 and 5. Smith v. State, 236 Ga. 12, 222 S.E. 2d 308, cert. denied sub nom. Smith v. Georgia, 428 U.S. 910 (1976) and sub nom. Spencer v. Georgia, 429 U.S 932 (1976), and Alderman v. State, 241 Ga. 496, 246 S.E.2d 642, cert. denied, 439 U.S. 991 (1978), in which defendants and accomplices plotted to kill their spouse or ex-spouse to collect the insurance proceeds.

6. Dix v. State, 238 Ga. 209, 232 S.E.2d 47 (1977), cert. denied, 445 U.S. 946 (1980), in which the defendant partially strangled his wife and repeatedly mutilated her with a knife before stabbing her to death. 238 Ga. at 211, 232 S.E.2d at 49.

In short, two of the six "domestic" cases cited by the court (Sirmans and Strickland) were wholly inapplicable: one on settled constitutional principles and one on the court's own express definition of the relevant category for purposes of comparison. The four remaining cases consisted of three carefully premeditated murders for money and a brutal and prolonged torture-murder.* These unlikely and plainly inapposite cases were held, however, to be more

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* The nine "multiple murder" cases selected for comparison by the Georgia Supreme Court are even more inapt. Two such cases--Strickland and Smith--have already been discussed. The remaining cases included four armed robberies, Mulligan v. State, 245 Ga. 266, 264 S.E.2d 204, addendum, 245 Ga. 881, 268 S.E.2d 351, cert. denied, 449 U.S. 986 (1980); Birt v. State, 236 Ga. 815, 225 S.E.2d 248, cert. denied, 429 U.S. 1029 (1976) (the Birt case also involved extensive torture of the two elderly victims); Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974), cert. denied, 431 U.S. 949 (1977); Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974), aff'd, 428 U.S. 153 (1976). The other cases involved the savage beating of two women with 2 x 4's, Westbrook v. State, 242 Ga. 151, 249 S.E.2d 524 (1978), cert. denied, 439 U.S. 1102 (1979), a "laughing" murder in a dispute over money followed by the "laughing" murder and mutilation of an accomplice to the crime, Fair v. State, 245 Ga. 868, 268 S.E.2d 316, cert. denied, 449 U.S. 986 (1980), and a shooting rampage in a crowded church. Chenault v. State, 234 Ga. 216, 215 S.E.2d 223 (1975).

"similar" to petitioner's crime than numerous domestic and nondomestic cases involving multiple killings or multiple wounds* in which the death sentence was refused. The fair inference is that the Georgia court no longer looks, if it ever did so, to the "past practice among juries faced with similar factual situations and like aggravating circumstances" to determine whether the sentences imposed were "excessive or disproportionate". Gregg v. Georgia, supra, 428 U.S. at 205 (citing Coley v. State, 231 Ga. 829, 835, 204 S.E.2d 612, 617 (1974)). Instead, it determines whether there are any cases in which the death penalty has been imposed which resemble in some unexplained fashion the defendant's case. If such cases can be found, however remote the resemblance, the sentence is affirmed.

In both of its aspects, then, appellate review in § (b)(7) cases as practiced by the Georgia Supreme Court tends to promote unconstitutional jury discretion rather than to eliminate it. The Hance construction on its face permits affirmance of § (b)(7) findings in many cases in which the death sentence is inappropriate. When that occurs, the limitation of proportionality review to a handful of "similar" cases in which the death penalty has been imposed guarantees that the Georgia court will not consider the facts of comparable life sentence cases which might indicate the impropriety of the death sentence imposed in the case under review. Appellate review simply does nothing to eliminate the possibility of aberrant death sentences created by the use of inadequate jury instructions.

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* See cases cited at pp. 18-19 n.* supra.

3. THE RISK OF ARBITRARINESS THAT RESULTS FROM THE USE OF SENTENCING INSTRUCTIONS IN THE LANGUAGE OF § (b)(7) CANNOT BE RENDERED HARMLESS BY THE FACT THAT THE JURY FOUND A SECOND AGGRAVATING CIRCUMSTANCE AS TO WHICH THE SENTENCING INSTRUCTIONS WERE, ARGUENDO, CONSTITUTIONALLY VALID.*

The death sentence imposed for the murder of Mrs. Gilreath was based solely upon the jury's finding of a § (b)(7) aggravating circumstance with respect to that murder. For the reasons stated above, that death sentence should therefore be vacated.

The death sentence imposed on account of Mr. Van Leeuwen's murder rests on jury findings of two aggravating circumstances: § (b)(7) and § (b)(2) (in that the murder of Mr. Van Leeuwen was committed in the course of another capital felony). The Georgia Supreme Court has repeatedly taken the position that the presence of a single valid aggravating circumstance--supported by the evidence--is sufficient to justify affirmance of the death sentence on appeal. See, e.g., Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981); Hamilton v. State, 246 Ga. 264, 271 S.E.2d 173 (1980), cert. denied, 101 S.Ct. 900 (1981); Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 446 U.S. 988 (1980). Nevertheless, in the circumstances of this case, the unconstitutional risk that instructions in the language of § (b)(7) may have led to arbitrary or capricious imposition of the death penalty is not rendered harmless by the fact that the jury may--but also may not--have placed

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* For purposes of this petition only it is assumed, arguendo, that the jury's finding as to the § (b)(2) aggravating circumstance was not constitutionally defective.

controlling significance upon its finding of the § (b)(2) aggravating circumstance in reaching its sentencing decision.

In this case, the jury was instructed pursuant to Georgia law to consider all aggravating circumstances warranted by the evidence. Ga. Code § 27-2534.1(c). The jury was also instructed that if it found one or more of the statutory aggravating circumstances it could impose the death sentence. But the jury was also told that it was under no compulsion to impose a death sentence even if it found that the prosecution had proved one or more statutory aggravating circumstances beyond a reasonable doubt. (Tr. 1300.)*

Given these facts, a jury finding of one statutory aggravating circumstance based upon a constitutional jury instruction cannot render harmless a simultaneous finding which was based upon an unconstitutional jury instruction. The jurors here were instructed that they were authorized to vote to impose the death sentence upon a finding of a § (b)(7) aggravating circumstance standing alone. Some jurors may well have done just that, without reference to the alternate finding, as they did in recommending the death sentence for the murder of Mrs. Gilreath. Other jurors may have viewed the alternate § (b)(2) aggravating circumstance as insufficient standing alone to justify imposition of the death penalty, but as sufficient to do so when combined with the unconstitutional § (b)(7) aggravating circumstance. Because the record before the reviewing court cannot elimi-

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* In at least one reported case the jury has recommended a life sentence despite finding four aggravating circumstances, including § (b)(7). Jordan v. State, 247 Ga. 328, 276 S.E.2d 224 (1981).

nate the possibility that the judgment below rested upon a constitutionally unsound ground, reversal is required. Stromberg v. California, 283 U.S. 359, 367-68 (1931); Bachellar v. Maryland, 397 U.S. 564, 570-71 (1970); Street v. New York, 394 U.S. 576, 585-88 (1969); Williams v. North Carolina, 317 U.S. 287, 291-92 (1942).

The Stromberg principle applies with special force in capital sentencing proceedings. Because death is different from other punishments in both its severity and its finality, there is a heightened "need for reliability in the determination that death is the appropriate punishment in a specific case". Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell & Stevens, JJ.); accord, Lockett v. Ohio, 438 U.S. 586, 604 (1978). Constitutional constraints upon the sentencing process are also designed to assure that "the decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion". Gardner v. Florida, 430 U.S. 349, 358 (1977) (Stevens, J.). Both of those purposes are frustrated when there exists a substantial possibility that the death sentence may have rested upon a finding reached "in the uncontrolled discretion of a basically uninstructed jury". Godfrey v. Georgia, supra, 446 U.S. at 429.

In recent opinions concurring in and dissenting from denials of certiorari, two members of this Court have indicated their view that the Georgia Supreme Court's repeated affirmances on the basis of a single valid aggravating circumstance--despite the presence of an invalid finding in the trial court record--represents a considered decision under state law that the Georgia court may, under

appropriate conditions, act as the final sentencing authority in capital cases. See, e.g., Westbrook v. Balkcom, 449 U.S. 999 (1980) (White, J., dissenting from denial of certiorari; Stevens, J., concurring).

Gardner v. Florida, supra, however, suggests that appellate reconsideration, even upon a full record, cannot substitute for full consideration of the case upon an untainted record by the initial sentencing authority under state law. 430 U.S. at 462. But even assuming that the Georgia court might under certain circumstances constitute itself as the final sentencing authority, with power to sentence the defendant to death upon a full review of all the evidence, that court's current review procedures are constitutionally inadequate for that task.

From what has already been said it should be apparent that the review function of the Georgia Supreme Court as performed in practice does not involve full consideration of the evidence presented at trial as it bears on the "particularized nature of the crime and the particularized characteristics of the individual defendant". Gregg v. Georgia, supra, 428 U.S. at 206. Instead, it focuses solely upon the issues (1) whether the jury could have found the "aggravating circumstances" which support the sentence and (2) whether there are "similar" cases in which the death sentence was imposed.

Given the limited nature of that review, affirmance on the ground that one aggravating circumstance was properly charged short circuits the "constitutionally indispensable" requirement that the sentencer give full consideration to "the character and record of the individual offender and the

circumstances of the particular offense", Woodson v. North Carolina, supra, 428 U.S. at 304, including "any aspect of the defendant's character or record and any of the circumstances of the offense [that are proffered] as a basis for a sentence less than death". Lockett v. Ohio, supra, 438 U.S. at 605. The sentencing jury, of course, has all such evidence before it, but that jury also has before it a defective instruction from the judge that it may, if it chooses, impose the death penalty on little more than a finding of the killing itself. An affirmance on the ground that the limited appellate review performed by the Georgia Supreme Court constitutes a separate sentencing proceeding thus deprives the defendant of his constitutional right to full and independent consideration of his sentence upon a complete and constitutionally untainted record.

4. THE QUESTION PRESENTED BY THE CONTINUING PRACTICE OF PRESENTING § (b)(7) INSTRUCTIONS TO THE JURY WITHOUT A CONSTITUTIONALLY PROPER LIMITING CONSTRUCTION IS RECURRENT AND IMPORTANT. THE REPEATED REFUSAL OF THE SUPREME COURT OF GEORGIA TO REQUIRE THE USE OF SUCH A LIMITING CONSTRUCTION REQUIRES THIS COURT'S INTERVENTION.

From the first passage of Georgia's amended death penalty statute following Furman v. Georgia, 408 U.S. 238 (1972), it has been apparent that § (b)(7) poses substantial risks of arbitrary jury action. In both Gregg and Godfrey this Court implicitly invited the Supreme Court of Georgia to develop and promulgate an interpretation of § (b)(7) that would permit constitutional application of the statute. 428 U.S. at 201; 446 U.S. at 429-32. Despite those invitations, the Georgia Supreme Court has taken no steps to assure that sentencing juries are provided with "clear and objective standards" for the administration of § (b)(7).

In more than two dozen cases decided since Godfrey involving death penalties imposed following a jury finding of the § (b)(7) aggravating circumstance, the Georgia Supreme Court has reversed only one jury finding of a § (b)(7) aggravating circumstance on account of the failure to provide an interpretation of the statute, and then only because the trial judge, in response to a request from the jury for clarifying instructions, refused to provide them. Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981). Moreover, the Georgia court has never suggested or directed that such limiting instructions be given at the sentencing phase of the trial. Instead, the court has repeatedly held, as it did here, that § (b)(7) is comprised of "words of ordinary significance which require no explication", 247 Ga. at 836, A. 37, and that no clarifying instructions are required. See, e.g., Solomon v. State, 247 Ga. 27, 271 S.E.2d 1 (1980), cert. denied, 101 S.Ct. 2348 (1981); Patrick v. State, 247 Ga. 168, 274 S.E.2d 570 (1981); Cape v. State, 246 Ga. 520, 527-28, 272 S.E.2d 487, 494 (1980), cert. denied, 101 S.Ct. 956 (1981).

The Georgia court's own cases indicate that the notion that juries readily understand § (b)(7) instructions is wrong as a matter of fact.* More important, the court's response begs the crucial question of whether the statutory

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* In Stevens v. State, supra, the jury requested a definition of the term "depravity of mind". In Gates v. State, 244 Ga. 587, 261 S.E. 2d 349 (1979), cert. denied, 445 U.S. 938 (1980), the jury requested a definition of "depravity of mind" and the trial judge erroneously defined it as encompassing only "depravity" of mind "in the victim". 244 Ga. at 598, 261 S.E.2d at 357.

language adequately guides the jury in distinguishing cases which are appropriate for imposition of the death penalty from those which are not. After Gregg and Godfrey, the answer to that question must be "No".

The same points apply with even greater force to the issue of whether a death sentence based upon a jury finding which resulted from an unconstitutional sentencing instruction may be affirmed on the ground that the jury made other findings in support of that sentence. This issue has been resolved against the defendant in many Georgia cases. See, e.g., Brooks v. State, 246 Ga. 262, 263 n.1, 271 S.E.2d 172, 174 n. 1 (1980), cert. denied, 101 S.Ct. 2000 (1981); Burger v. State, 245 Ga. 458, 460-61, 265 S.E.2d 796, 800, cert. denied, 446 U.S. 988 (1980); Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938 (1980). The Court of Appeals for the Fifth Circuit has now taken the contrary view, holding that the presence of an unconstitutional aggravating circumstance requires that the death sentence be vacated, and this Court has granted certiorari to resolve the conflict, Stephens v. Zant, 631 F.2d 397, 405-06 (5th Cir. 1980), reh. denied, 648 F.2d 446, cert. granted, No. 81-89 (October 5, 1981). Petitioner believes that the issues raised in this case appropriately could be considered in conjunction with those raised in Stephens v. Zant.*

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the

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* In the event that the writ is not immediately granted, petitioner suggests that this case should be held until the decision on the merits in Stephens v. Zant.

Georgia Supreme Court.

Respectfully submitted,

JOHN R. HUPPER,
One Chase Manhattan Plaza,
New York, New York 10005

Counsel for Petitioner

Of Counsel:

JEANNE EDNA THELWELL
STEPHEN M. BUNDY

CRAVATH, SWAINE & MOORE,
One Chase Manhattan Plaza,
New York, New York 10005

October 13, 1981

# Appendix

37255. Gilreath v. The State

HILL, Presiding Justice.

This is a death penalty case. Fred Marion Gilreath, Jr., appeals his convictions and sentences to death for the murders of his wife and his father-in-law.

On May 11, 1979, Dempsey Wolfenbarger went to the Mableton Precinct of the Cobb County Police where he spoke with Corporal J. E. Davis. Wolfenbarger told Davis he was concerned about the safety of his stepdaughter, Linda Gilreath. He explained that Linda was in the process of obtaining a divorce from her husband, Fred Marion Gilreath, Jr., and that several days previously she had left their home to stay with her mother (Wolfenbarger's wife). Earlier on the 11th she had returned with her father to the Gilreath home, indicating that she would pick her stepfather up at work at 3:30 p.m. When Linda had not returned, her mother asked a friend, Shirley Harrell, to pick Wolfenbarger up at work. Once he arrived home, his wife (Linda's mother) called Linda's attorney for advice. He suggested that the Wolfenbargers go over to the house; Dempsey Wolfenbarger decided instead to go to the police station. He told Corporal Davis that he feared there might be "domestic trouble", and that Fred Gilreath had threatened Linda's life as well as the lives of the Wolfenbargers, and had threatened to burn the Wolfenbargers' trailer. Wolfenbarger also told Davis his tires had been slashed and he believed Gilreath had done it. Finally, he said that Linda was driving a blue Plymouth Duster and Gilreath drove a red truck.[1]

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[1] When Dempsey Wolfenbarger solicited the aid of the police he was acting for the most part on information supplied by his wife. She testified that she had told her

Cpl. Davis radioed for a back-up unit; Officer Roy Rogers responded and the two police officers arrived at the Gilreath residence at approximately 5:00 p.m. The blue Duster was not in sight. Cpl. Davis knocked on the front door; no one answered. Rogers knocked at the side door to a screened-in porch; no one answered. Davis then peered into the enclosed garage looking for the Duster. He rejoined Rogers by the side screened porch and they observed that both the porch door and the sliding glass door inside the porch were ajar, that the sound of music could be heard, and that a strong odor of gasoline permeated the area. The two officers then entered the screened porch (which Davis described as looking like an enclosed carport) and looked through the sliding glass door. From that vantage point, Rogers saw a man's body. He then stepped inside the glass door and saw Linda's body. Rogers told Davis he had found a second body and Davis entered, too. The two officers could see large puddles of gasoline in the kitchen and toward the living room; they also saw a shotgun and a shell lying on the floor. They then checked the other rooms of the house looking for the Gilreaths'

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husband that Linda's father, Gerrit Van Leeuwen, had come to her home, where Linda was staying, about 12:30 p.m. on May 11th. He came in the blue Duster to get Linda to come home to talk to her husband and pick up her personal belongings. Linda and her father left for the Gilreath residence in the blue Duster at about 1:30 p.m. It takes about ten minutes driving time to reach the Gilreath home from the Wolfenbarger home. Linda said she would be back in time to pick Dempsey Wolfenbarger up at work at 3:30 p.m. About 2:30 p.m., Mrs. Wolfenbarger began phoning the Gilreath home but got no answer. Mrs. Wolfenbarger asked a friend, Shirley Harrell, to pick Dempsey up at work. Mrs. Harrell passed the Gilreath's residence coming and going; she told the Wolfenbargers that she saw Fred Gilreath's red truck and Gerrit Van Leeuwen's gold Volkswagen in the driveway, but she did not see the blue Duster.

two children.[2] Finding no one, the officers called the detectives, secured the crime scene (they disturbed nothing except that they opened the front door to disperse the gas fumes) and went outside to await the detectives. Wolfenbarger arrived shortly after Davis and Rogers discovered the bodies but was not allowed to enter the house.

Detective Julian Deal arrived at about 5:33 p.m. He walked through the house, interviewed Dempsey Wolfenbarger, and then reentered the house to complete his investigation, i.e., locate evidence, take measurements and make drawings.[3] Deal testified that upon checking he discerned no signs of forcible entry into the house. He found a green army-type gas can sitting by the door to the screened porch. He entered through the sliding glass doors and found Linda Gilreath's body lying between a coffee table and a love seat in the living room; a pink towel covered her face and a white medium-sized suitcase sat by the end table. The evidence showed that Linda had been shot five times along her right side with a .30-.30 lever action rifle from approximatley two to three feet away. She had been shot in the face from approximately five to six feet away with a .12 gauge shotgun. Matter from her face was splattered across the love seat, carpet and walls.

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[2] Mr. Wolfenbarger had told Cpl. Davis the Gilreaths had two children. The officers were not aware that Linda Gilreath and Shirley Harrell had taken the children to Seneca, South Carolina, the day before to stay with Linda's sister.

[3] Deal was assisted by Detective Tressell. At least two other officers were at the scene.

Gerrit Van Leeuwen was lying a short distance away; he had sustained a .30-.30 wound to his right thigh, a shotgun wound to his left chest, and two .22 caliber wounds to his head. Gasoline had been poured on and around the victims as well as on the kitchen floor.

Sgt. Deal seized numberous items which were in plain view, among them a .22 caliber short shell casing, six .30-.30 caliber shell casings, two shotgun shell casings, a .22 caliber rifle and a .12 gauge shotgun. Two days later he returned with a search warrant and recovered another .22 caliber shell casing.

Prior to diagramming the crime scene, Sgt. Deal had placed a southeastern regional lookout on Fred Gilreath and on the blue Duster. Upon receiving the message, the dispatcher for the sheriff's department in Hendersonville, North Carolina, contacted Mike Gilreath who lived and worked in Hendersonville, told him about the message, and asked him to let the sheriff's department know if he saw or heard from his brother Fred. Fred Gilreath arrived at his brother's office, driving the blue Duster, at approximately 7:30 p.m. Mike Gilreath immediately asked one of his business associates to go tell the sheriff that his brother had arrived. The business associate, being new in town, went first to the police station from whence he was directed to the sheriff's office. Three officers arrived at Mike Gilreath's office at 8:00 or 8:05 p.m. By then Fred Gilreath had showered with his clothes on and was wearing only his still wet cut-off shorts.[4] The officers arrested him, explaining that he

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[4] A forensic serologist from the State Crime Laboratory testified that she examined these shorts and found a stain which could have been blood. Because the sample was inadequate, it could not be positively identified.

was wanted for questioning in relation to a double homicide in Georgia; Gilreath asked if he could call his wife.

Sgt. Deal arrived in Hendersonville the next day. Pursuant to a warrant he searched the Duster that afternoon and again on May 14th. In the latter search a partial box of .22 caliber short ammunition was recovered. While in North Carolina, Sgt. Deal traveled to a cabin, purportedly belonging to Fred Gilreath, located in a mountainous area. Deal testified that he went to get a description of the property in order to procure a search warrant. Upon reaching the area, Deal walked down an old road to the cabin. While standing out front, he picked up several shotgun shell cases, .30-.30 caliber cartridge cases, and .22 caliber cartridge cases which were lying in the drive. Three shotgun shell cases and eleven .30-.30 caliber Browning shell cases which Deal retrieved at this time were later introduced into evidence.

The shotgun and the .22 caliber rifle which were found at the scene were identified as the murder weapons by a firearms examiner from the State Crime Laboratory. The firearms examiner also established that the .30-.30 caliber shells which were fired at the victims were fired by the same firearm which had fired the .30-.30 shells found in the drive of the cabin in North Carolina.

The Gilreaths' next door neighbor testified that he heard muffled gunshots coming from the direction of the Gilreaths' home between 1:30 p.m. and 2:40 p.m. on May 11.[5] He paid little attention to them because it was not uncommon to hear gunshots in the neighborhood. This

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[5] The neighbor was able to fix the time because he arrived at home about 1:30 and his stepson came home from school at 2:30 or 2:40. He knew the shots occurred in the interim.

neighbor also reported having seen water in the street. When police contacted the Cobb County Water Department they found three workmen who had bled a water hydrant directly across the street from the Gilreath residence on May 11. The workmen had arrived at approximately 1:30 p.m. and left at approximately 1:50 p.m. One workman testified he heard five rapid-fire shots from what sounded like a high-powered rifle emanate from the Gilreath residence. He also testified that he was busy doing paperwork and did not see anyone. Another of the workmen testified that he saw a Volkswagen and a van or truck in back of the garage at the Gilreath residence when he arrived. After he arrived, he noticed that a blue car, probably a Dodge, had driven up and parked in the driveway. Because he was getting something from the truck, he did not see the blue car arrive. After the blue car arrived, he saw an old man walk around the house, come back, and go back around the house. He then heard the five shots and did not see the old man again. Shortly thereafter the water crew left; the blue car was still there. The third workman testified that he saw a dark blue over light blue Duster drive up and saw two people get out. One of the two (the passenger) was an elderly man. He saw the elderly man walking around the yard; about a minute after the elderly man disappeared behind the house, he heard the five shots. The worker was unable to say whether the driver of the blue Duster was a man or a woman. He did testify that at the time he heard the shots there were four cars at the Gilreath residence: the blue Duster, a gold Volkswagen, an old red pickup truck, and another old

car on blocks.[6] From the foregoing, the jury was authorized to find that the murders occurred between 1:30 (or 1:40) and 1:50 and that the blue Duster was at the scene when the shots were fired.

Fred Gilreath testified in his own defense. He stated that he was home on May 11 with his father-in-law. His father-in-law left about 11:30 to go to his ex-wife's home. He was downstairs in his father-in-law's apartment when he heard his wife and her father come in. He heard his wife in the bedroom; he went upstairs and started out the door, telling his father-in-law he would be back in a few minutes. His father-in-law said "Linda's here and she wants to talk to you" but Gilreath responded, "Gary, I told you I am not ready to talk to Linda. I don't want to talk to her until I get back from North Carolina." He then left in the blue Duster at 1:25 p.m., intending to go to the liquor store and come back. He had had two drinks of rum while alone at the house. At the liquor store he bought a beer and a fifth of vodka. He mixed the two and while drinking decided to go on to Hendersonville. Before proceeding to North Carolina, he went by Statewide Beverages looking for a friend who owed him money. He did not find that man but did speak with another acquaintance, David Bridges. According to the defendant, when he spoke with Bridges he was not drunk, but he was "intoxicated" and things were "a little bit fuzzy".[7] He was

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[6] Officer Davis had testified that, when he arrived at the Gilreath residence on May 11, in addition to the gold Volkswagen and the red pickup, there was a green or off-green Duster on blocks in the driveway.

[7] David Bridges was called as a witness by the state. When asked if the defendant appeared to have been drinking before arriving at the liquor store, he responded "I really

wearing cut-off shorts, a tee shirt, a terry cloth hat and sandals. He continued drinking and was sick as he crossed a bridge connecting South and North Carolina. When he reached Hendersonville, he tried to rent a motel room but the clerk refused to give him a room because he was drunk so he went on to his brother's office. When he told his brother he needed to go take a shower to sober up, his brother told him there was a shower in the office. He took off his sandals and hat and put them on an end of the tub because there was nowhere else to put them; his shorts he hung on the one hook available. When he finished showering he discovered his brother had no towels so he put his shorts back on although he was wet, thus accounting for his clothes being wet.

Gilreath identified the .22 caliber rifle and the shotgun as his, as well as the gas can which he said he used for the lawn mower. He denied having killed his wife or his father-in-law.

The jury found Gilreath guilty of both murders and sentenced him to death for each. This is his appeal.

1. Defendant made a pre-trial motion to suppress evidence seized from his home on May 11, 1979, and on May 14, 1979. He argued in his motion that Officers Davis and Rogers had no probable cause to enter the curtilage of his home on May 11, and thus everything subsequently seized was subject to suppression. He further argued that

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couldn't tell you". He then explained that he had previously been with the defendant when he was drinking and he couldn't notice any difference in him when he had a drink or two, adding that he appeared to hold his liquor well.

the probable cause supporting the warrant pursuant to which the house was searched on May 14 was tainted by the allegedly illegal search which had occurred on May 11. The trial court overruled the motion. On appeal, the defendant reiterates his argument that because the officers made a warrantless entry into the yard or curtilage of his home, all evidence seized as a result of that entry must be suppressed. Citing the Fourth Amendment to the United States Constitution, Code Ann. § 1-804, the Georgia Constitution, Art. I, Sec. I, Par. X (Code Ann. § 2-110), Code Ann. § 27-303, and Clare v. State, 135 Ga. App. 281 (217 SE2d 638) (1975), he argues that no warrantless entry may ever be made into the curtilage of a residence or the residence itself absent consent of the owners or residents of the property.

We deal here with two separate entries: the entry within the curtilage to knock at the front and side doors, and the entry onto the side porch itself. Defendant argues that notwithstanding Wolfenbarger's request for aid, the police were powerless to set foot on his property absent a warrant or consent by an owner or a resident of the home. We disagree. The Fourth Amendment proscribes unreasonable searches and seizures. When police respond to requests to locate missing persons by entering private property only to the extent of knocking on outer doors, the fourth amendment has not been violated. We recognize, of course, that "the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime". Michigan v. Tyler, 436 U.S. 499, 504 (98 SC 1942, 56 LE2d 486) (1978). But it does not extend so far as to prevent the police from making any

contact with the citizenry--and to hold that the police may not, upon request, although exigent circumstances do not appear, approach the outer doors of a dwelling absent a warrant or consent of an owner or occupant would work that result.

Although defendant relies on a number of Georgia cases, none in fact support his premise. In Clare v. State, supra, a police officer answered a complaint of a loud disturbance and upon arrival was told by a woman visiting her mother in a first floor apartment that the occupants of a second floor apartment had played a stereo loudly for nearly an hour. The officer proceeded to knock at the outside door to the upstairs apartment; when it was opened, without asking permission he walked up the steps and into the defendant's living room. The objectionable intrusion occurred when he entered the apartment, not when he knocked at the door. Likewise in Brewer v. State, 129 Ga. App. 118 (199 SE2d 109) (1973), police answering a complaint about loudness walked up outside steps to a second story apartment and directly into a room without stopping to knock. The issue the Court of Appeals addressed was whether "the sheriff and his deputy [were] entitled to open the screen door and cross over the threshold into the room without knocking, without identifying themselves, and without asking permission to enter?" Id., 129 Ga. App. at 119. In both Lewis v. State, 126 Ga. App. 123 (190 SE2d 123) (1972), and Black v. State, 119 Ga. App. 855 (168 SE2d 916) (1969), the officers entered the curtilage of homes without warrants in order to investigate property within the curtilage but outside the homes to determine whether it was stolen. None of these cases offer any support to the defendant here. To the contrary, in our view both Clare v. State,

supra, and Brewer v. State, supra, proceed from an underlying premise that the officer's approach to the outside door, even though it be within the curtilage, is unobjectionable. Of course this is not to say, as Black v. State, supra, and Lewis v. State, supra, clarify, that a search of the curtilage in investigation of a crime is unobjectionable.

In Mincey v. Arizona, 437 U.S. 385, 392-393 (98 SC 2408, 57 LE2d 290) (1978), the Supreme Court said: "We do not question the right of the police to respond to emergency situations. Numerous state and Federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. . . And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities." In Ellison v. United States, 206 F2d 476 (D.C. Cir. 1953), police officers investigating the robbery of a drug store went to the defendant's home because he had committed a similar robbery previously. They walked up onto the front porch and rang the doorbell; while waiting for an answer and again while waiting for the defendant's mother (who answered the door) to ascertain whether he was at home, the officers saw several bottles of the type found in the prescription department of drug stores and some cigarettes lying around. The defendant contended that the officers' entry onto his premises was a trespass and their viewing of the bottles and cigarettes was

an illegal search. The court responded: "The officers were perfectly entitled to go to appellant's door, ring the bell, and inquire as to his whereabouts. They were not trespassers in so doing." Id., 206 F.2d at 478. More recently, the Eighth Circuit approved a warrantless police entry into a residence where the police were responding to a call for assistance because the occupant was drunk, United States v. Nord, 586 F2d 1288 (8th Cir. 1978), and the Fourth Circuit when confronted with a police officer's search of a house trailer for a child when he was informed by radio that a young girl had been pronounced dead upon arrival at a hospital and no one knew where her sister was, found no fourth amendment violation. Sallie v. North Carolina, 587 F2d 636 (4th Cir. 1978), cert. denied, 441 U.S. 911 (1979).

We find that none of defendant's fourth amendment rights have been violated. Dempsey Wolfenbarger asked the police to go to the defendant's home because he feared for the safety of his stepdaughter. In responding to his request, the police were authorized to enter the curtilage of the home and knock on the outer doors. It is unnecessary to decide whether the door to the side porch was the threshold to the home or whether the police could legitimately prceed through the porch to the sliding glass doors because in this case that entry was preceded by an awareness of exigent circumstances--the police had become aware of a heavy odor of gasoline emanating from a residence they had some reason to believe was occupied because they could hear music playing although the occupants had not answered the door. Gasoline being readily combustible, the police were authorized to proceed onto the side porch to fulfill their responsibility of

ensuring public safety. Once they reached the sliding glass door one of the officers saw Van Leeuwen's body. This further exigent circumstance authorized him to enter the house immediately in search of Linda Gilreath and any other people in the house.

The state's contention that all of the evidence seized as a result of this warrantless entry was in plain view has not been challenged by the defendant. He does not contend that once the officers entered the house the evidence was not subject to seizure under the plain view doctrine; he contends the entry was illegal and that the plain view doctrine could never come into play. We disagree, and hold that under the facts of this case Officers Davis and Rogers were authorized to enter the porch and the house itself, and Detectives Deal and Tressell were authorized to join them there and seize evidence in plain view. Mincey v. Arizona, supra. Furthermore even assuming that once Officers Davis and Rogers had determined the victims were dead and no one else was in the house Detective Deal could not enter the premises and seize evidence in plain view absent a warrant (an assumption with which we disagree), in this case exigent circumstances for Deal's entry did exist. Because of the quantity of gasoline that had been poured inside the house, the fire department had been called and according to Deal arrived about five minutes after he did. See Michigan v. Tyler, 436 U.S. 499, 509-510, supra. Thus it was necessary for the police to record the scene immediately lest a fire or the necessary activity of

the firemen disturb it.[8] In sum, we find that the trial court properly overruled the defendant's motion to suppress the evidence seized from his home on May 11, 1979.

2. The defendant also complains of the introduction into evidence of the spent shell casings seized by Detective Deal from the drive in front of defendant's cabin in North Carolina. He concedes he filed no written motion to suppress as required by Code Ann. § 27-313 (b) but argues he has not waived his objection because the reason he filed no written motion was that he did not realize the shells had been seized without a warrant until Detective Deal so testified at trial and it was then too late.[9] The record shows, however, that defense counsel was permitted to inspect the physical evidence prior to trial. Thus, the defense knew that the shell casings had been seized; what the defense claims was not known was that the seizure was made without a warrant. Deal identified the exhibits without objection on February 28 and they were not admitted into evidence until February 29. We find that by failing to comply with Code Ann. § 27-313(b), the defendant

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[8] Although we have discussed the entry and activity of Detective Deal and those police officers who arrived after Davis and Rogers had preliminarily secured the scene, we note defendant's sole objection was to the entry by Davis and Rogers.

[9] The evidence relating to their seizure is the following testimony by Detective Deal: "This was purported to be Mr. Gilreath's cabin. I went to it for the purposes of obtaining a description of the property so I could get a search warrant for it. On walking to it, we observed it and were standing out. There was an old road that went down to it and we had to walk down it to get to the cabin. We got there. We were standing out front. The front door was open and there were several different shotgun and .30-30 caliber cartridge cases lying out in the road area there, and there was also some .22 caliber cartridge cases laying out there." Detective Deal then identified the exhibits as having been "recovered from that driveway" and "collected in that drive out front".

waived any objection to the admission of the shells. Yeldell v. State, 240 Ga. 37 (2) (239 SE2d 364) (1977).

Defendant also complains of the introduction of the evidence seized outside the cabin in North Carolina on the ground that the state violated the dictates of Brady v. Maryland, 373 U.S. 83 (83 SC 1194, 10 LE2d 215) (1963); Giles v. Maryland, 386 U.S. 66 (87 SC 793, 17 LE2d 737) (1967); and Giglio v. United States, 405 U.S. 150 (92 SC 763, 31 LE2d 104) (1972), by not responding to his motion to compel discovery of all exculpatory material and information with a statement that the evidence had been seized without a warrant. In our view, neither Brady nor its progeny contemplates such a disclosure. The Court in Brady stated it applied to "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment. . . ." Brady v. Maryland, supra, 373 U.S. at 87. As has been noted frequently, suppression of evidence is contrary to the truthseeking process. See Stone v. Powell, 428 U.S. 465, 490 (96 SC 3037, 49 LE2d 1067) (1976). We hold that the absence of a warrant is not "material either to guilt or punishment" within the purview of Brady. Thus this enumeration is without merit.

3. Gilreath contends that the trial court's failure to give an oath to the prospective jurors prior to the voir dire as provided by Code Ann. § 59-704.1 (Ga. Laws 1979, p. 1048) mandates reversal. Code Ann. § 59-704.1 provides: "Each panel, prior to commencing voir dire, shall take the following oath: 'You shall give true answers to all questions as may be asked by the court or its authority, including all questions asked by parties or their attorneys,

concerning your qualifications as jurors in the case of_____ _____(herein state the case). So help you God.' This oath shall be administered by the trial judge." Defendant raised this issue for the first time in his motion for new trial. The matter having been called to its attention, the state obtained the affidavit of Judge Luther Hames of the Cobb County Superior Court, in which he stated "that as part of my duties on February 25, 1980, I gave the jurors for that week the following oaths: 'You shall well and truly try each cause submitted to you during the present term, and a true verdict give, according to the law as given you in charge, and the opinion you entertain of the evidence produced to you, to the best of your skill and knowledge, without favor or affection to either party, provided you are not discharged from the consideration of the case submitted, and you do further swear that you shall give true answers to all questions as may be asked by the parties or their attorneys, concerning your qualifications as jurors. So help you God." This case was tried before Senior Judge John W. Williford from February 25-29, 1980.

The oath given by Judge Hames tracks Code Ann. § 59-706, which provides an oath for petit juries in civil cases. However Judge Hames added at the end of the oath prescribed by Code Ann. § 59-706 language similar to that contained in Code Ann. § 59-704.1; that is, he swore the jurors to give true answers during voir dire. Defendant makes much of the absence of the name of his case and the fact that the oath was not given by the trial judge. These differences do not require reversal. See Slaughter v. State, 100 Ga. 323, 326 (28 SE 159) (1897). The record

shows that the jury was in fact sworn to give true answers on voir dire, and that the oath was administered by a judge. Ates v. State, 155 Ga. App. 97 (2) (270 SE2d 455) (1980), relied on by the defendant, is inapposite because there the voir dire oath was administered by the district attorney. In Gober v. State, 247 Ga. 652 (2) (278 SE2d 386) (1981), we held that where the Code Ann. § 59-706 oath was administered but the oath required by Code Ann. § 59-704.1 was not administered, reversal was not required where no objection had been made.

Defendant also complains that the voir dire oath was given outside his presence. He argues that he has a right to be present during every stage of the trial and that he did not waive that right as to the voir dire oath. As defendant asserts, "It is the legal right of a person accused of crime in this State to be present at all stages of his trial . . . ." Wilson v. State, 212 Ga. 73, 74 (90 SE2d 557) (1955). Defendant cites numerous cases wherein the defendant's absence required reversal, but all involve either the jury viewing evidence outside the courthouse, Chance v. State, 156 Ga. 428 (1) (119 SE 303) (1923); rereading evidence, Wade v. State, 12 Ga. 25 (1852); argument of counsel, Wilson v. State, supra, 212 Ga. 73; recharging the jury, Wilson v. State, 87 Ga. 583 (13 SE 566) (1891); Bonner v. State, 67 Ga. 510 (1881); Martin v. State, 51 Ga. 567 (1874); a colloquy between the jury and the trial judge, Seay v. State, 111 Ga. App. 22 (3) (140 SE2d 283) (1965); receiving a verdict, Lyons v. State, 7 Ga. App. 50 (66 SE 149) (1909); or ordering a mistrial when the jury was unable to reach a verdict, Bagwell v. State, 129 Ga. 170 (1)

(58 SE 650) (1907). None involve the administration of an oath to the jury.[10] We find that the voir dire oath prescribed by Code Ann. § 59-704.1 is not a "stage of the trial", within the meaning of Wilson v. State, supra, and is not a critical stage of the proceedings, such as would require reversal based on the defendant's absence where no motion to have the oath administered to the prospective jurors was timely made.

4. Defendant also complains because the district attorney administered the oath to those jurors who were selected to try the case although the statute provides that "The judge or clerk of the court shall administer the oath to the jurors." Code Ann. § 59-709, as amended, Ga. L. 1978, p. 910. The record shows, however, that the defendant, who was present when the district attorney administered this oath failed to object. Thus his reliance on Ates v. State, supra, 155 Ga. App. 97 (2), is misplaced, because there the district attorney administered the oath over defendant's objection. See also Tyson v. State, 157 Ga. App. 569 (278 SE2d 8) (1981). Here no objection was made and hence no reversible error occurred. Altman v. State, 156 Ga. App. 185 (10) (273 SE2d 923) (1980). "A party cannot during the trial ignore what he thinks to be an injustice, take his chance on a favorable verdict, and complain later." Joyner v. State, 208 Ga. 435 (2) (67 SE2d 221) (1951).

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[10] The only case we have found involving the defendant's presence while an oath was administered is Gray v. State, 229 Ga. 808 (194 SE2d 479) (1972). The oath involved there was that given to the jury selected to try the case, and the issue of defendant's right to be present was not reached because he was brought in mid-oath whereupon the trial court interrupted the proceedings and had the jury sworn in the defendant's presence.

5. During voir dire, the defendant's attorney asked a potential juror whether he believed "that in the case of the death penalty that some one would intervene and stop the execution?" The juror answered, "That is always possible." Defendant's attorney then asked, "How would that affect you in your decision about whether the life or the death penalty would be given?" The juror answered, "It wouldn't." The state's objection to the latter question as calling for a conclusion was sustained. Defendant's attorney then asked, "Let me ask you this, Mr. Roper. If you, assuming hypothetically that a man got the death penalty, do you believe it is really just a life imprisonment rather than the death penalty, or do you believe that that person is going to be executed?" The court sustained the state's objection and instructed the jurors as follows: "Well, I'll charge you this. Ladies and Gentlemen. I will charge all you jurors that in the event that you find the Defendant guilty of Count One, Count Two, or both, you would assume that whatever penalty you issued would be carried out. Does everybody understand that?" At that point the transcript states that the prospective jurors nodded their heads affirmatively.

Appellant contends that the court's ruling violated his due process rights and prevented him from making a meaningful examination of the jurors, as contemplated by Code Ann. § 59-705. He points out that no executions have occurred in Georgia in some 16 years, and he theorizes that some jurors might assess the death penalty more casually than otherwise because they think it will not

be carried out."[11] In support of his contention he points to the response of a prior juror who when asked "[O]n this death penalty business, you don't doubt for a second that if this Jury found my client guilty and gave him the death sentence, that he would be executed, do you?" responded, "I know that there has been a long time since any have been executed, so it seems that is still kind of up in the air. I don't know if that answers your question or not." This juror, however, when next asked, "You don't feel like if he got the death penalty that he might just sit down there and really have a life imprisonment?", responded, "No, Sir."

We find no error in the trial court's ruling in view of the court's instruction to the jury that they assume whatever punishment they imposed would be carried out. The questions proposed by the defendant are not contemplated by Code Ann. § 59-705 and the trial court did not abuse its discretion in disallowing them. See Smith v. State, 238 Ga. 146 (5) (231 SE2d 757) (1977). Nor did the trial court's ruling deprive defendant of due process. We note, in this connection, that while a prosecutor's argument, over objection, that the jury should impose the death penalty and assume it will be set aside if not warranted, absent curative instructions, would require reversal, see Fleming v. State, 240 Ga. 142, 146 (240 SE2d 37) (1977), the defendant may argue to the jury that they should weigh the decision on punishment heavily since if they impose the death

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[11] This is an updated version of the "Private Slovik syndrome" argument. See Ross v. State, 238 Ga. 445 (233 SE2d 381) (1977).

penalty the state will exact it.[12]

6. In addition to his complaint that the state did not disclose Detective Deal's visit to his North Carolina cabin, Division 2, supra, the defendant contends that his motion to compel disclosure of all exculpatory material and information was not complied with in several other respects. First he complains that although he specifically asked for all statements made by the defendant as well as for all information which would in any way weaken or tend to weaken the state's case against the defendant, two statements that he had made were not disclosed by the trial court following its in camera inspection, and thus the trial court erred in overruling his motion for mistrial made when the statements were introduced.[13] The statements he refers to were that when told by a Detective Harris with the Henderson County Sheriff's Department that warrants had been issued in Cobb County for his arrest for the murder of his wife and father-in-law, he responded by saying that could not be and asking if he could call his wife; and that when Detective Deal asked in his first encounter with the defendant if he knew what he had been charged with, the defendant responded "Some homicide," and

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[12] The defendant did argue to the jury: "The buck stops right here, Ladies and Gentlemen. The only person who can sentence this man is you. It stops right on this bar. If that situation occurred that I just described to you [another person later confessing], it wouldn't be [the prosecutor's] fault that the wrong man went to the electric chair. He would say 'Oh, the Jury did that,' because you are the only ones who can do it." (In this connection, see division 18 which indicates that some jurors were crying when they returned the death penalty verdict.)

[13] This case was tried before the effective date of Ga. L. 1980, p. 1388; Code Ann. § 27-1302, providing for production of defendant's statements.

when Deal said "You are charged with the murders of your wife and father-in-law," the defendant said "I was afraid it was that because she didn't call" and "I have got to go back to my cell." When the state sought to introduce these statements, the defendant objected on the ground that they had not been produced. The court overruled the objections. On appeal, the defendant complains because the statements were not disclosed to him until the witnesses testified and because his motions for mistrial were overruled. Brady v. Maryland, supra, Division 2, applies to exculpatory material unknown to the defendant. United States v. Agurs, 427 U.S. 97, 103 (96 SC 2392, 49 LE2d 342) (1976). Statements made by the defendant are not unknown to him and hence are not discoverable under Brady. Baker v. State, 245 Ga. 657 (3)(266 SE2d 477)(1980). Moreover, the record shows that at the conclusion of the first day of trial, the trial court informed the defendant that he had completed his in camera inspection of the state's file and orally disclosed the two statements at issue. Detective Harris testified on the second day of trial and Detective Deal testified on the third day.[14] Brady requires that exculpatory evidence not be withheld from the defendant at trial; this requirement was met here. Chafin v. State, 246 Ga. 709 (6)(273 SE2d 147)(1980). Thus the defendant's enumerations of error are without merit.

7. In his motion to compel disclosure of all exculpatory material and information, the defendant also sought disclosure of any evidence or statements which might be used

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[14] The first day of trial was February 26, 1979. February 25 was consumed by voir dire and other pre-trial matters.

to impeach the credibility of any of the state's witnesses. On appeal, he complains that he was not given a copy of Jerry Roddy's pre-trial statement to the police until after the state had rested its case. Jerry Roddy was one of the Cobb County Water Department employees who was working across the street from the Gilreath residence on the afternoon in question. Defendant contends that his testimony at trial differed materially from this statement and that the state must have been aware of the discrepancies no later than immediately prior to the trial when he was reinterviewed by a detective and the assistant district attorney who worked with the district attorney in trying the case. Once the witness had concluded his testimony on direct examination, the defendant renewed his motion to obtain a copy of his statement. The motion was overruled and the defendant proceeded to cross-examine Roddy. Subsequently, after the state had rested, the trial court provided a copy of Roddy's statement to the defendant and the defendant recalled Roddy and cross-examined him with reference to the statement. The cross-examination revealed inconsistencies between his statement and his testimony which will be discussed infra, Division 14.

Defendant contends that the failure of the district attorney to disclose the statement as soon as it became evident that it was impeaching, violated the dictates of Brady v. Maryland, supra, 373 U.S. 83, and Giles v. Maryland, supra, 386 U.S. 66. We cannot agree. Defendant concedes that Roddy's statement did not become impeaching until he contradicted it in his testimony, although he speculates that the state became aware of potential contradictions shortly before trial. But the critical fact in our view is that Roddy's

statement was provided to him during the trial and he was allowed to recall Roddy and cross-examine him with reference to it. See Chafin v. State, supra. A prior contradictory statement of a witness does not become contradictory or exculpatory until the witness testifies.

Defendant argues that exculpatory materials must be furnished at an appropriate time. See Williams v. Dutton, 400 F2d 797 (5th Cir. 1968), cert. denied, 393 U.S. 1105 (1969). He argues that exculpatory materials must be furnished before trial when the material is such that it cannot be effectively used if disclosure is withheld until trial. See United States v. Thevis, 84 FRD 47 (N.D. Ga. 1979). A statement of a witness which does no more than show that the witness made a prior contradictory statement has its most effective use at trial, in cross-examination. We find no violation of Brady and no harm to the defendant.[15]

8. Defendant enumerates as error the trial court's overruling of his notice to produce served upon the district attorney. Relying on Code Ann. § 38-801, the defendant sought to obtain statements of those witnesses who testified for the state after they had testified.[16] He points out that Federal law requires such disclosure after the witness has testified, 18 USCA § 3500, and that pre-trial disclosure of witnesses' names and statements is recommended by the ABA Standards, Discovery and Procedures Before Trial § 2.1(a)(1970). Georgia

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[15] After the defendant filed his motion to compel disclosure of exculpatory material, the trial court conducted an in camera inspection of the district attorney's file and then sealed and transmitted copies of the material inspected to this court. We have reviewed that material and determined that no exculpatory material was withheld from the defendant.

[16] Jerry Roddy's statement, which is discussed in Division 7, supra, was of course included within the terms of this request.

law is to the contrary, however. "'[S]tatements of witnesses in the prosecutor's files (nothing more appearing) may not be reached by Code Ann. § 38-801(g).'" Holton v. State, 243 Ga. 312(2)(253 SE2d 736)(1979), cert. denied 444 U.S. 925 (1979), quoting Stevens v. State, 242 Ga. 34(1)(247 SE2d 838)(1978). And 18 USCA § 3500 is neither constitutionally required nor applicable to state trials. United States v. Augenblick, 393 U.S. 348, 356 (89 SC 528, 21 LE2d 537)(1969); Calley v. Callaway, 519 F2d 184 (5th Cir. 1975), cert. denied, 42_ U.S. 911 (1976). The trial court did not err in overruling the notice to produce.

9. Defendant complains that five of the state's exhibits were admitted over his complaint that the chain of custody was not established. The five are: (1) Exhibit 30, a blue work shirt which was removed from the body of Gerrit Van Leeuwen; (2) Exhibit 35, a pill box containing two .22 caliber lead bullets; (3) Exhibit 43, a pill box containing one .30 caliber metal jacketed bullet and one lead core; (4) Exhibit 44, a small pill box containing several mutilated buckshot and some wadding; (5) Exhibit 45, a small plastic vial with four buckshot. The first four exhibits were identified by Dr. Joseph Burton, the Cobb County Medical Examiner who performed autopsies on the victims' bodies, as having been removed from the victims' bodies, packaged, labeled and sent by him to the State Crime Laboratory. Kelly Fite, a firearms examiner at the State Crime Laboratory, testified that he received them. Contrary to defendant's assertion, this testimony adequately establishes the chain of custody of these exhibits. Murphy v. State, 238 Ga. 725(3)(234 SE2d 911) (1977). As for the fifth item, Exhibit 45, we have neither been directed to nor been able to locate any place in his

testimony where Dr. Burton identifies it. Kelly Fite did identify exhibit 45 as having been sent to the crime lab by Dr. Burton. Assuming without deciding that the chain of custody of exhibit 45 was not properly established, in view of the fact that several other buckshot were retrieved and identified, the introduction of exhibit 45 was not reversible error.

10. Defendant complains that the trial court erred in introducing bank records of the Gilreaths' account to show the defendant had made a large withdrawal a few days before the murders over his objection that they were not properly authenticated under Code Ann. § 38-711. A review of the record shows that copies of the bank's microfilms of the Gilreaths' account were identified by Richard Fisher, Assistant Vice President and Custodian of the Records for the National Bank of Cobb County. Mr. Fisher explained the bank's method of making and maintaining these microfilm records. When a witness' testimony shows that records were made in the regular course of business and that it was a regular course of business to make such records within a reasonable time of the act, transaction, occurrence or event, it is unnecessary that the witness use these specific words. Home Finance Co. v. Smith, 116 Ga. App. 76(1)(156 SE2d 522) (1967). The trial court did not err in admitting these records.

11. Defendant complains that the trial court erred in overruling his objection to color photographs of the victims and their wounds, arguing that they were repetitive and cumulative and that their prejudicial effect outweighed

this probative value. Neither in the trial court nor here has the defendant specified which photograph or photographs he contends were repetitive and cumulative of which other photograph. On appeal he does say "There were three separate pictures of the exploded head of one victim." We have examined all the photographs and determined that they were not unduly repetitive. Since they were accurate and correct representations of material fact, their probative value outweighed their prejudicial effect and the trial court did not err in admitting them. Franklin v. State, 245 Ga. 141(3) (263 SE2d 666), cert. denied, 447 U.S. 930 (1980).

12. When Grace Wolfenbarger testified, she identified state's exhibit 1 as a photograph of the blue Plymouth Duster that her daughter and ex-husband drove when they left her home. Subsequently, the photograph was tendered and admitted into evidence without objection.

When the prosecutor attempted to introduce four other photographs of cars, which in addition to state's exhibit 1 had allegedly comprised a photographic lineup shown to certain witnesses, the defendant objected that no foundation had been laid as it had not been shown that they were shown to any witnesses. The trial court sustained this objection. Later in the trial Jerry Roddy testified that these five photographs had been shown to him, but the latter four were never admitted into evidence.

During his closing argument, the district attorney told the jury that the pictures would go out with them and requested the jury to "take a look at that lineup when you go out". At that point, defendant objected on the basis

that four of the pictures had not been admitted. The trial court concurred with the defendant, but when the district attorney recollected that they had been admitted, the trial was recessed briefly while the court reporter checked the record. When it became clear that they had never been admitted, the defendant moved for a mistrial. The trial court overruled the motion and instructed the jurors to disregard the district attorney's comments and the pictures themselves in the event that they had seen them. Defendant now complains that the trial court erred in overruling his motion for mistrial. We cannot agree. The pictures of the four cars used in a photographic array are not prejudicial. Even assuming the defendant was prejudiced by this occurrence, the trial court's instructions were curative and the court did not abuse its discretion in denying the motion. Roberts v. State, 242 Ga. 634(4) (250 SE2d 482) (1978); Patterson v. State, 239 Ga. 409(2) (238 SE2d 2) (1977).

13. Defendant contends that the trial court erred in refusing to give five charges which he requested. We deal with each singly.

First, the trial court did not err in refusing to charge on intoxication. The defendant requested a charge substantially in the language of Pattern Charge I-32, which reads:

> "Voluntary intoxication by use of alcohol (drugs or narcotics) is not excuse for crime. The fact that one accused of a crime was under the influence of alcohol (drugs or narcotics) at the time of the alleged crime may be shown as illustrative of his motive in the transaction, but one voluntarily under the influence of alcohol (drugs or narcotics) is presumed to intend the legitimate consequences of his act, and the question is whether he intended to do the act, or whether

> he intended the consequences of the act. If a person under the influence of alcohol (drugs or narcotics) is sufficiently intelligent to know or understand and intend to do a certain act and to understand that certain consequences are likely to result from it, and does the act, he is criminally liable for the consequences of his act. However, if because of the influence of alcohol (drugs or narcotics), one's mind becomes so impaired as to render him incapable of forming an intent to do the act charged, or to understand that a certain consequence would likely result from it, he would not be criminally responsible for the act. Whether or not that is true is a question for the jury to determine."

The trial court charged the last sentence of Code Ann. § 26-704: "Voluntary intoxication shall not be an excuse for any criminal act or omission." The charge as given correctly stated Georgia law. Code Ann. § 26-704; Choice v. State, 31 Ga. 424(7) (1860) Beck v. State, 76 Ga. 452(1) (1886); Thomas V. State, 105 Ga. App. 754 (125 SE2d 679) (1962). The case before us, as in so many cases, but unlike the cases cited, involves only intoxication; the case before us does not involve any question of sanity. The pattern charge is misleading to the extent that it implies that voluntary intoxication in and of itself may be a defense to a crime, and the trial court did not err in refusing the requested charge.

The trial court did not err in charging on flight, especially since the court charged the jury that it was up to them "to determine if there was flight" as well as to consider whether an explanation other than consciousness of guilt might explain any flight. Harris v. State, 234 Ga. 871, 874 (218 SE2d 583)(1975).

Defendant submitted requests to chage on voluntary

manslaughter and on irresistible passion and cooling time, and a request that the trial court charge that the state had the burden of proving that the defendant did not act in the heat of passion, that is, did not commit voluntary manslaughter. The trial court did not err in refusing to charge voluntary manslaughter since there was no evidence of any "sudden, violent and irresistible passion resulting from serious provocation". Code Ann. § 26-1102; Bowen v. State, 241 Ga. 492(2), (246 SE2d 322) (1978). Separation of husband and wife, including the turmoil associated therewith, and the filing of suit for divorce, without more, do not reduce murder to involuntary manslaughter. Likewise the trial court did not err in refusing to charge on irresistible passion and cooling time. If the defendant is contending that in every murder case the state must disprove the elements of voluntary manslaughter, we disagree. Davis v. State, 237 Ga. 279(2), (227 SE2d 249) (1976). If he is contending that where the evidence raises an issue as to voluntary manslaughter, the burden is on the state to disprove that the defendant acted in the heat of passion, that issue is rendered moot by our finding that the evidence did not raise an issue as to voluntary manslaughter.

Finally, the defendant requested a charge that malice cannot be implied by the jury but that the state must produce evidence that shows malice beyond a reasonable doubt. The court charged Code Ann. § 26-1101: "Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart." We approved this charge in Franklin v. State, supra, 245 Ga. 141, (263 SE2d 666)(9). The court then charged:

> "[M]alice as an element of the crime of murder may not generally be implied. Evidence must be presented by the state of a deliberate intention unlawfully to take away the life of a fellow creature, by the Defendant, which is manifested by external circumstances capable of proof or from other evidence introduced by the state which satisfies your mind beyond a reasonable doubt that Defendant acted with malice aforethought."

This is the charge defendant requested, except that the trial court added the word "generally". This enumeration of error is without merit.

14. Defendant contends that his conviction must be reversed because the evidence is insufficient to support the verdict. He contends that all of the evidence is consistent with his own testimony as to his innocence except that of Jerry Roddy and Steven Stone, the two employees of the Cobb County Water Department who testified that the blue Duster was at the Gilreath house when the shots were fired, and their testimony was so completely impeached as to be of no probative value. Stone testified on direct examination that he had seen a dark blue over light blue Duster arrive, that two people got out, one of whom was an elderly man, and that the Duster was still there when the shots were fired. On cross-examination, defendant established that at his first interview, on May 17, 1979, the first mention of the Duster was when Detective Deal asked: "Do you recall a blue Plymouth Duster, light blue, dark blue top, it was a '72, 1972 blue Plymouth Duster?" Stone responded that all he knew was that it was a light colored car, but if Detective Deal showed him a picture he could tell him whether it was the car he saw. He went on to say that about a week later Detective Deal showed him pictures of six or seven cars and he picked the Duster out. The

defendant also established that in this initial statement Stone said, "As far as watching who got out of the car and all, I can't remember as to how many got out of the car or who was in the car, anything like that but I do remember a car pulling in the driveway." Finally, the defendant established that Stone had signed an affidavit prepared by a private investigator which stated that a man in his late forties or early fifties was already in the yard when the blue car (which he described as either a Duster or a Demon) arrived and that two people got out of the blue car, one of whom was a man about 30 years old. Stone testified that he did not recall ever having said the older man was already in the yard, and that he had made a mistake in not reading the affidavit carefully before he signed it. He admitted that he had said a man about 30 got out of the car, but testified that he really was not positive it was a man and it could have been a woman.

Jerry Roddy testified on direct examination that when he was first at the water hydrant the blue Duster was not there, that he went to get a sign to put under the water so it would not tear up the grass and when he came back to the blue car, which he described as a Dodge, had arrived, and that at that point he saw an older man in the yard for the first time. On cross-examination, defendant established that when Roddy was first interviewed by Detective Deal on May 17, 1979, he stated that: "We was in the truck when he heard the gunshot. . . .", and that when asked what cars he had seen he mentioned the gold Volkswagen, the red truck, and the old green Duster, but he said nothing about a blue car being there or arriving while he was there. On redirect,

he testified that at a later date he was shown five pictures of cars and he identified the blue Duster.

Defendant contends that these two witnesses were so thoroughly impeached that their testimony should be disregarded, pursuant to Code Ann. § 38-1806. Code Ann. § 38-1806 provides:

> "When a witness shall be successfully contradicted as to a material matter, his credit as to other matters shall be for the jury, but if a witness shall swear wilfully and knowingly falsely, his testimony shall be disregarded entirely, unless corroborated by circumstances or other unimpeached evidence. The credit to be given his testimony where impeached for general bad character or for contradictory statements out of court shall be for the jury to determine."

This record does not disclose that the witnesses swore "wilfully and knowingly falsely". The question of credibility of witnesses is for the jury. Davis v. State, 242 Ga. 901(8) (252 SE2d 443) (1979), vacated and remanded on other grounds, 446 U.S. 961 (1980).

The jury was authorized to find that the defendant was having a domestic dispute with his wife, that the victims arrived at the defendant's home in a blue Duster, that the murders occurred between 1:30 and 1:50 p.m., that Linda Gilreath had time to pack some of her belongings after she arrived and before she was killed, that Gerrit Van Leeuwen was outside when the shooting started, that the victims were killed with weapons belonging to the defendant and kept in his home, that the weapons bore no fingerprints, that the house showed no evidence of forced entry, that the perpetrator poured gasoline on the victims and from there to the kitchen where it could have ignited, that the blue Duster was at the house when the shots were fired, that the defendant was driving the blue Duster when he was arrested in North

Carolina, that he had taken a shower with his clothes on, and that there was a possibility that he had had blood on his clothes. Defendant contends that he left the house shortly after his wife and her father arrived. He speculates that the murders were committed by someone who arrived after he left. However, there is no evidence that anyone else arrived before the shots were heard.

Reviewing the evidence in the light most favorable to the jury's determination, we find that it was sufficient to enable a rational trier of fact to find the defendant guilty of both murders beyond a reasonable doubt. Crawford v. State, 245 Ga. 89(1) (263 SE2d 131) (1980); Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979). This enumeration of error is without merit.

15. Defendant's remaining enumerations of error relate to the sentencing phase of his trial. He contends that because of three instances of improper argument by the district attorney his sentences to death must be reversed. His first complaint concerns the district attorney's argument: "Whether or not we argue or we think that the defendant may or may never get out of jail is not for us to say, but you as jurors have to look at punishment that meets the crime. It is as simple as that." The defendant moved for a mistrial on the ground that this argument contravened Code Ann. § 27-2206, which provides:

> "No attorney at law in a criminal case shall argue to or in the presence of the jury that a defendant, if convicted, may not be required to suffer the full penalty imposed by the court or jury, because pardon, parole, or clemency of any nature may be granted by the Governor, State Board of Pardons and Paroles, or other proper authority vested with the right to grant clemency. If counsel for either side in a criminal case should so argue to the jury, opposing counsel shall have

> the right to immediately request the court to declare a mistrial; and in which case, it shall be mandatory upon the court to declare a mistrial; and upon failure so to do, same shall constitute reversible error. This section shall be construed as setting forth regulations in addition to those provided for in section 24-3319 and section 81-1009."

The trial court overruled the motion for mistrial.

The purpose of the statute is to prevent prosecutors from arguing in essence that the jury should give a more severe sentence to compensate for possible pardon, parole, or other clemency. Upon objection to argument which contravenes this statute, a mistrial is mandatory. Dicta to the contrary in Spraggins v. State, 243 Ga. 73(1) (252 SE2d 620) (1979), vacated and remanded on other grounds, 446 U.S. 961 (1980), is contrary to the statute and will not be followed.

At issue, here, however, is whether the district attorney's comment contravened the statute. The district attorney made no reference to pardon, parole or other clemency. We find that his argument does not contravene the statute. Redd v. State, 242 Ga. 876(4) (252 SE2d 383) (1979); Mason v. State, 236 Ga. 46(7) (222 SE2d 339), cert. denied, 428 U.S. 910 (1976).

Defendant also complains of two other remarks made by the district attorney in his closing argument. He contends that the district attorney went outside the record in arguing:

> "[E]very day that I sit down on the third floor and I look at four thousand felons come in, there are those cases that deserve a little bit of mercy, and there are those cases where the element of mercy should be involved, but then there are those cases, Ladies and Gentlemen, where mercy is sought after, and you know in your heart and in your mind that from the evidence that mercy will be thrown back in your face";

and in arguing that capital punishment saves lives and is a

"form of self defense". Were this not a death penalty case, these enumerations of error would present nothing for review since no objection to these remarks was made. McAllister v. State, 231 Ga. 368(1) (202 SE2d 54) (1973); Scott v. State, 229 Ga. 541(6) (192 SE2d 367) (1972). Because this is a death penalty case, and the allegedly improper argument occurred in the sentencing phase of the trial, we have reviewed these remarks and determined that they were not so inflammatory and prejudicial as to mandate setting aside the death penalty on the basis that it was imposed under the influence of passion, prejudice, or any other arbitrary factor. Code Ann. § 27-2537(c)(1); Potts v. State, 241 Ga. 67(15) (243 SE2d 510) (1978).

16. Defendant enumerates as error several aspects of the trial court's charge in the sentencing phase of his trial. First, he contends that Godfrey v. Georgia, 446 U.S. 420 (100 SC 1759, 64 LE2d 398) (1980), holds that a charge which recites the aggravating circumstance established by Code Ann. § 27-2534.1(b)(7), that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim", without explaining any of these terms, results in "standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury. . . ." Godfrey v. Georgia, supra, 446 U.S. at 429.[17] While we do not read Godfrey as holding that no

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[17] We note that in the case before us the trial court's charge of this aggravating circumstance used "and" instead of "or" throughout. On the other hand, in Godfrey, supra, the district attorney stated to the jury that "torture" and "aggravated battery" were not involved and the jury found only that "the offense of murder was outrageously or wantonly vile, horrible and inhuman".

death sentence imposed on the basis of this aggravating circumstance may stand absent clarifying instructions by the trial court, we find it unnecessary to decide that question here because there was no request for clarifying instructions. Moreover, all of the terms in Code Ann. § 27-2534.1(b)(7) are words of ordinary significance which require no explication, with the exception of "aggravated battery". "Aggravated battery" is a crime defined by statute. Code Ann. § 26-1305. In this case, the trial court charged the definition of aggravated battery as provided in that Code section.

Defendant enumerates error on the trial judge's failure to charge without request that the aggravated battery must occur before death. See Hance v. State, 245 Ga. 856(3) (268 SE2d 339) (1980). Just as we do not agree that the trial court must, at least absent request, clarify the meaning of Code Ann. § 27-2534.1(b)(7), we do not agree that the trial court must charge without request that aggravated battery must occur before death. The jury clearly would understand this from the definition of aggravated battery given in charge.

Defendant also enumerates as error the trial court's submission to the jury of the aggravating circumstance established by Code Ann. § 27-2534.1(b)(2) with reference to the murder of Gerrit Van Leeuwen. That section provides "The offense of murder . . . was committed while the offender was engaged in the commission of another capital felony. . . ." The charge complained of follows: "The murder of Gerrit Willem Van Leeuwen was committed while the offender was engaged in the commission of another capital felony, to wit, the murder of Linda Van Leeuwen Gilreath." Focusing on the

words "while . . . engaged in the commission of another capital felony", defendant argues that Code Ann. § 27-2534.1 (b)(2) only applies where the accompanying capital felony is a "continuing offense", such as armed robbery. He urges that a murder cannot be accomplished while one is "in the commission" of another murder.[18] We find this construction of Code Ann. § 27-2534.1(b)(2) excessively narrow and decline to adopt it. Strickland v. State, 247 Ga. 219, 230-31 (275 SE2d 29) (1981); Peek v. State, 239 Ga. 422, 431 (238 SE2d 12)(1977), cert. denied, 439 U.S. 882 (1978). This enumeration is without merit, as is the enumeration which asserts that this aggravating circumstance cannot be applied under the evidence here because it is not possible to know which victim was shot first.

17. Defendant's final objection to the charge of the trial court is that the trial court erred in charging as follows: "If there are no aggravating circumstances found to exist unanimously and beyond a reasonable doubt, then fix the sentence punishment at life." Defendant contends this statement would have led the jury to believe it was up to the defendant to disprove the aggravating circumstances before a life sentence would be authorized. We cannot agree. This sentence was excerpted from the last paragraph of the charge, which reads as follows:

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[18] In support of this theory, the defendant cites Godfrey v. Georgia, supra, 446 U.S. at 433, n. 15: "Georgia does not, as do some States, make multiple murders an aggravating circumstance, as such." We do not believe that in making that comment the United States Supreme Court was construing Code Ann. § 27-2534.1(b)(2) as being inapplicable to multiple murders.

"Now, go down here to Count Number Two. If you find one or more of the aggravating circumstances do exist unanimously and beyond a reasonable doubt, there again then you would determine whether or not you recommend to the mercy of the Court or recommend life imprisonment or whether you recommend the death penalty. Bear in mind that anything and everything this Court has said, under no circumstances conceivable do you have to render a death penalty recommendation. Y'all understand that, so you go out now, consider whether these aggravating circumstances exist, and if they don't, just fix life imprisonment as to Count One and Two. If they exist as to Count One, if aggravating circumstances exist as to Count One, then you determine whether it will be life imprisonment or a death penalty. Come down to Count Two. If there are no aggravating circumstances found to exist unanimously and beyond a reasonable doubt, then fix the sentence punishment at life. If you find one or more of these aggravating circumstances under Count Two listed as B and C in the notice of aggravating circumstances, then you would determine whether or not you would recommend them to the mercy of the Court or recommend a life sentence or whether you would recommend the death penalty. Do you understand?"

Having reviewed the entire charge and the portion objected to in context, we find no merit in this enumeration of error.

18. Defendant contends that the trial court erred in denying his motion for mistrial as to the sentencing phase of the trial. Defendant moved for mistrial at the time sentence was imposed on Monday, March 3, 1980, the trial having been concluded on Friday, February 29, 1980. In so moving, defendant's counsel stated:

"If it please the Court, on Friday evening at approximately midnight when the Jury brought back the death sentence in this case, I observed, and I state in my place at this time that I observed that at least five and possibly six of the women jurors on this jury were sobbing and seemed to be in great emotional distress. The emotional distress continued while the sentence was read by the clerk of this court and even thereafter in the hallways. . . ."

The trial court overruled the motion, stating,

"at the time of the death sentence, each juror was polled and I didn't notice anything in particular. I noticed that some of them obviously may have been crying, but they certainly were not in the jury box, and that was also true when they came out with a verdict of guilty, so I don't think that we had a situation here at all that was

real emotional from the standpoint of anything displayed in the courtroom, and I will overrule your motion."

Even assuming that several jurors were crying as and immediately after the death penalty verdict was announced, this does not show as defendant asserts, that the death penalty was "imposed under the influence of passion [or] prejudice. . . . " Code Ann. § 27-2537(c)(1). Such behavior tends rather to show that the jurors appreciated the enormity of their decision. The jury having been polled, the trial court did not err in overruling the motion for mistrial and the alternative motions that the defendant either be sentenced to life or granted a new trial as to sentencing, or that the jurors be reconvened for a hearing to determine whether the death sentences were rendered under the influence of passion.

19. In four enumerations of error, Gilreath contends that, as to each murder, the evidence does not support the jury's finding that the murders were "outrageously or wantonly vile, horrible or inhuman in that [they] involved torture, depravity of mind, or an aggravated battery to the victim". Code Ann § 27-2534.1(b)(7). In support of this contention, he relies on Godfrey v. Georgia, 446 U.S. 420, supra. We disagree with his contention that this case is indistinguishable from Godfrey. In Godfrey, each victim was shot only once, except for the shooting the bodies were untouched, and the defendant remained at the scene. Here Linda Gilreath was shot six times; her father was shot four times. According to the medical examiner, a forensic pathologist, although each of Linda's six wounds was fatal, each would not render her unconscious instantaneously. In fact as the defendant established on cross examination, depending on

which wound was inflicted first, she would have been able to scream after being shot.[19] As for her father, the wound to his leg was not fatal, altough it rendered his leg useless; the wound to his chest was fatal, but not necessarily instanteously; the two wounds to his head were fatal and would have rendered him instantly unconscious. Additionally, gasoline was poured over the bodies and although it was not ignited, since a pilot light was burning in the kitchen the defendant may well have expected it to ignite after he left the scene. Thus the evidence supports the jury's finding of Code Ann. § 27-2534.1(b)(7) as to each murder. Hance v. State, supra, 245 Ga. 856.

20. Defendant contends that because under Code Ann. § 26-3102 the trial court must sentence a defendant to death where the jury finds a statutory aggravating circumstance and recommends death, while where a defendant pleads guilty, the trial court may sentence the defendant to life imprisonment or death, Code Ann. § 26-3102 unconstitutionally burdens his right to a jury trial. He relies on United States v. Jackson, 390 U.S. 570 (88 SC. 1209, 20 LE2d 138) (1968). In Jackson, the Supreme Court held unconstitutional a portion of a Federal statute because it provided that

> "In an interstate kidnapping case where the victim has been liberated unharmed, the defendant's assertion of

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[19] The medical examiner theorized, in his reconstruction of the scene, that Linda Gilreath was first shot five times by the .30-30 lever action rifle, with the shots moving up her body; her father then walked in and was shot in the leg by the same weapon. Her father was then shot in the chest by the shotgun, following which Linda Gilreath was shot in the face by the shotgun. Finally, her father was shot twice in the head by the .22 caliber rifle.

> the right to jury trial may cost him his life, for the federal statute authorizes the jury--and only the jury--to return a verdict of death." Id. at 572.

The Georgia statute does not create such a dilemma since a defendant may be sentenced to death by a jury, or by a judge upon a plea of guilty. Code Ann. §§ 26-3102, 27-2528. See Moore v. State, 233 Ga. 861 (213 SE2d 829) (1975), cert. denied, 428 U.S. 910 (1976); Fair v. State, 245 Ga. 868 (268 SE2d 316), cert. denied, 101 SC 407 (1980).

The defendant also relies on Justice Blackmun's concurring opinion in Lockett v. Ohio, 438 U.S. 586, 613 (98 SC 2954, 57 LE2d 973) (1978). Justice Blackmun pointed out that in Ohio, upon a plea of guilty or no contest to a charge of aggravated murder, a trial court could dismiss the specifications of aggravating circumstances in the interest of justice, which dismissal precludes imposition of the death penalty. Id. at 618. But where the jury finds an aggravating circumstance, the trial court may impose life imprisonment rather than the death penalty only upon finding one of the statutory mitigating circumstances exists. Id. at 618-19. Lockett is inapposite because in Georgia, whether sentencing be by judge or jury, life imprisonment may be imposed even though statutory aggravating circumstances are found to exist. Code Ann. §§ 26-3102, 27-2528; Fleming v. State, 240 Ga. 142(7), supra. In sum, we find no merit in this enumeration of error. Likewise we find no merit in the enumeration of error contending that the death penalty is cruel and unusual punishment and is thus proscribed by both the United States and the Georgia constitutions. Gregg v. Georgia, 428 U.S. 153 (96 SC 2909, 49 LE2d 859) (1976).

21. As required by Ga. L. 1973, p. 159, et seq. (Code Ann. § 27-2537(c)(1-3)), we have reviewed the death sentences in this case. We have considered the aggravating circumstances found by the jury and the evidence concerning the crime and the defendant pursuant to the mandate of the statute. We conclude that the sentence of death imposed in this case was not imposed under the influence of passion, prejudice or any arbitrary factor. See Divisions 15 and 18.

The jury found the following aggravating circumstances: (a) the murder of Linda Van Leeuwen Gilreath was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind and an aggravated battery to the victim (Code Ann. § 27-2534.1(b)(7)); (b) the murder of Gerrit Willem Van Leeuwen was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind, and aggravated battery to the victim (Code Ann. § 27-2534.1(b)(7)); and (c) the murder of Gerrit Willem Van Leeuwen was committed while the offender was engaged in the commission of another capital felony, to wit: the murder of Linda Van Leeuwen Gilreath (Code Ann. § 27-2534.1(b)(2)).

During the guilt-innocence phase of the trial, the jury found the defendant guilty of two counts of murder. The imposition of the death penalty where the evidence as to guilt is circumstantial is not unconstitutional. Nelson v. State, 247 Ga. 172(15) (274 SE2d 317) (1981); see also the cases cited in the concurring opinion in Nelson. We find that the evidence factually substantiates and supports the findings of guilt and the aggravating circumstances by

a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, supra; Hance v. State, supra. See Divisions 14 and 19, above.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. Cases selected for comparison include those involving a death sentence or those involving a life sentence for domestic homicides, that is, where the victim was a girlfriend, spouse or ex-spouse of the perpetrator or a relative of the girlfriend, spouse or ex-spouse. As we noted in Tyler v. State, 247 Ga. 119, 126 (274 SE2d 549) (1981),

> "although lesser sentences than death are frequently imposed in domestic murder cases, it does not follow that the death penalty would not be authorized for the murder of one spouse by another under any circumstances",

citing Dix v. State, 238 Ga. 209 (232 SE2d 47) (1977). Some of the most vicious homicides have been perpetrated by family members against one another. Since January 1, 1970, juries throughout the state have given the death penalty in six domestic murder cases. See Appendix. Thus, domestic murders are not "a capriciously selected group of offenders" within the proscription of Gregg v. Georgia, supra, 428 U.S. at 199. In two such cases in which the death penalty was returned, as in the instant case, the defendants had no prior record.

The nine multiple murder cases selected for comparison likewise illustrate that the death penalty is imposed in such cases. (Two such cases, Smith v. State, 236 Ga. 12 (222 SE2d 308) (1976), and Strickland v. State,

247 Ga. 219 (275 SE2d 29) (1981), were also considered as "domestic" cases.)

In sum, we find that the similar domestic and multiple murder cases listed in the Appendix support the affirmance of the death penalty. The defendant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

Judgment affirmed. All the Justices concur.

DECIDED JUNE 30, 1981

REHEARING DENIED JULY 15, 1981

Murder. Cobb Superior Court. Before Judge Williford, Senior Judge.

Land, Atkinson & Schane, Tyrus R. Atkinson, Jr., for appellant.

Thomas J. Charron, District Attorney, Debra Halpern Bernes, Assistant District Attorney, Arthur K. Bolton, Attorney General, Nicholas G. Dumich, Assistant Attorney General, for appellee.

APPENDIX

Sirmans v. State, 229 Ga. 743 (194 SE2d 476) (1972); Gregg v. State, 233 Ga. 117 (210 SE2d 659) (1974); Floyd v. State, 233 Ga. 280 (210 SE2d 810) (1974); Chenault v. State, 234 Ga. 216 (215 SE2d 223) (1975); Smith v. State, 236 Ga. 12 (222 SE2d 208) (1976); Burt v. State, 236 Ga. 815 (225 SE2d 248) (1976); Dix v. State, 238 Ga. 209 (232 SE2d 47) (1977); Alderman v. State, 241 Ga. 496 (246 SE2d 642) (1978); Westbrook v. State, 242 Ga. 151 (249 SE2d 524) (1978); Mulligan v. State, 245 Ga. 266 (264 SE2d 204)

(1980); Addendum--245 Ga. 881 (268 SE2d 351) (1980); Pair v. State, 245 Ga. 868 (268 SE2d 316) (1980); Tyler v. State, 247 Ga. 119 (274 SE2d 549) (1981); Strickland v. State, 247 Ga. 219 (275 SE2d 29) (1981).

Gilreath v. Georgia

Application for Extension of Time in Which
to File Petition for Writ of Certiorari
August 28, 1981

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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No.

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FRED MARION GILREATH, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

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APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

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To the Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Petitioner, by his counsel, respectfully applies pursuant to Rules 20.1 and 20.6 for an order extending by thirty (30) days petitioner's time within which to file a petition for a writ of certiorari in this action. The extension sought is from September 14, 1981, to and including October 13, 1981. In support of this application, petitioner states as follows.

1. This application is submitted more than 10 days prior to September 14, 1981, the present due date for filing of the petition.

2. Petitioner was convicted of two counts of murder in the Superior Court of Cobb County, Georgia and

was sentenced to death on March 3, 1980. Petitioner's conviction and sentence of death were affirmed by the Georgia Supreme Court on June 30, 1981. Rehearing was denied in that court on July 15, 1981. A copy of the opinion of the Georgia Supreme Court is appended hereto as Exhibit A, and a copy of revised page 22 of that opinion, upon which the court noted its denial of rehearing, is appended hereto as Exhibit B.

3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

4. Federal questions of substantial importance were raised in the trial court and in the Georgia Supreme Court and were decided adversely to petitioner on the merits. These included the question whether Georgia's statutory capital punishment scheme was applied in petitioner's case in violation of the Eighth and Fourteenth Amendment standards established in Gregg v. Georgia, 428 U.S. 153 (1976), Godfrey v. Georgia, 446 U.S. 420 (1980), and other decisions of this Court. See, e.g., Exhibit A at 35, 38-39. Petitioner also believes that consideration on the merits of other significant Federal questions was prevented by the Georgia Supreme Court's arbitrary and unprecedented application of purported state procedural requirements not previously invoked in similar cases. Id. at 34-35.

5. Petitioner is now indigent. At trial petitioner was represented by retained counsel. Petitioner's trial counsel was appointed by the Georgia Supreme Court to represent him on his appeal to that court. Because trial counsel is not in a position to continue to represent petitioner, the undersigned was retained on a pro bono basis in early

August 1981 to represent petitioner in this Court. Counsel has only recently received the state court record, which is over 1,500 pages long.

6. Many of the legal issues decided adversely to petitioner below are difficult in that they involve both the complex jurisprudence of the Cruel and Unusual Punishments Clause and the administration, over a 10 year period, of Georgia's capital punishment statute.

7. The additional time requested is necessary to properly present those issues and others to the Court. The record below is voluminous, and petitioner's newly retained counsel is not yet fully familiar with it. Many of the legal issues presented are difficult. These considerations--and the fact that petitioner is under sentence of death--strongly support the grant of this application.

8. Counsel for petitioner has been informed by Nicholas G. Dumich, Assistant Attorney General for respondent State of Georgia, that respondent will not oppose this application.

Accordingly, on behalf of petitioner, Fred Marion Gilreath, Jr., counsel respectfully requests that this application be granted and that the time for petitioner to file his petition for a writ of certiorari be extended from September 14, 1981, to October 13, 1981.

Respectfully submitted,

/s/ John R. Hupper
John R. Hupper

One Chase Manhattan Plaza,
New York, N.Y. 10005

Counsel for Petitioner
Fred Marion Gilreath, Jr.

August 28, 1981

I hereby certify that on this 28th day of August, 1981, copies of this application were mailed, postage prepaid, to Nicholas G. Dumich, Esq., 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334, and to Thomas J. Charron, Esq., District Attorney, Cobb Judicial Circuit, P.O. Box 649, Marietta, Georgia 30061. I further certify that all parties required to be served have been served.

/s/ John R. Hupper
Counsel for Petitioner

Order of Honorable Lewis F. Powell Granting
Application for Extension of Time in Which
to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. A-175

FRED MARION GILREATH, JR.,

Petitioner

v.

GEORGIA

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ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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UPON CONSIDERATION of the application of counsel for petitioner~~XXX~~ IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

October 13, 1981

/s/ Lewis F. Powell, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 31st

day of August, 1981

## APPENDIX

### Pertinent Parts of Statutes Involved

United States Constitution

Eighth Amendment

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Georgia Code Annotated

26-1305 Aggravated battery

"A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof. A person convicted of aggravated battery shall be punished by imprisonment for not less than one nor more than 20 years. A person who knowingly commits aggravated battery upon a peace officer while such officer is engaged in or on account of the performance of his official duties shall upon conviction be punished by imprisonment for not less than ten nor more than 20 years."

27-2534.1 Mitigating and aggravating circumstances; death peanalty

"(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all case of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committe while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of

the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed."

27-2537 Review of death sentences

"(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated

in section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

Gilreath v. State

Superior Court of Cobb County, Georgia
Charge of the Court
February 29, 1980

CHARGE OF THE COURT

Ladies and Gentlemen, having rendered a verdict of guilty of murder as to Count One and guilty of murder as to Count Two, it is now your duty to make a finding as to the penalty that shall be imposed upon this Defendant for the offense of murder stated in Count One and the offense of murder stated in Count Two.

In reaching this determination, you are authorized to consider all of the evidence received by you in open court in both phases of the trial, and all of the facts and circumstances of the case.

Under the laws of the State of Georgia, every person guilty of the offense of murder shall be punished by life in the penitentiary or death by electrocution. It is my duty to instruct you with regard to the factors which you may consider in making the decision which will determine the punishment to be imposed as to Count One and Count Two.

Mitigating circumstances are those which do not constitute a justification or excuse for the commission of the offense or offenses in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame.

Aggravating circumstances are those which increase the guilt or enormity of the offense, or add to its injurious consequences. If a person is convicted of murder, a sentence of death shall not be imposed unless the Jury's verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a

recommendation of death is made, the Court shall sentence the Defendant to death by electrocution. These principles apply to Count One and to Count Two and you make separate determinations as to Count One, that is, the sentence as to Count One and whether or not there were aggravating circumstances, and the sentence as to Count Two, whether or not there were aggravating circumstances. Then whether or not you recommend life in prison or if there are aggravating circumstances, of if there is an aggravating circumstance, whether or not you recommend the death sentence.

Where a sentence of death is not recommended by the Jury, the Court shall sentence the Defendant to imprisonment for life. I charge you that the State contends that statutory circumstances exist in this case as follows. Now, with reference to Count One, the State lists this notice of aggravating circumstances, or rather, in this notice of aggravating circumstances, Section A. That is as to Count One, and here is what it says: "The murder of Linda Van Leeuwen Gilreath was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind, and an aggravated battery to the victim." Now, aggravated battery is described in the Code 26-1305 as follows, Ladies and Gentlemen. Aggravated Battery. 26-1305. A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body or by rendering a member of his body useless or by seriously disfiguring his body or a member thereof. That is the definition of aggravated battery.

Now, with reference to Count Two, the State lists two alleged aggravating circumstances for your consideration.

As I say, this will be out with you. Now, the first one is set up as B, and B says this: "The murder of Gerrit Willem Van Leeuwen was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind and aggravated battery to the victim," and then C as follows: "The murder of Gerrit Willem Van Leeuwen was committed while the offender was engaged in the commission of another capital felony, to wit, the murder of Linda Van Leeuwen Gilreath." Now, these have to be filed with the Clerk and they have been, and these are just simply out as I say because the law says they are to be sent out with you. You are not to presume anything one way or the other or to imply anything one way or the other other than the fact that they are out for your consideration. Y'all understand that.

Now, Ladies and Gentlemen, as I say, the State charges that these statutory circumstances exist in the case and I read to you those circumstances. One is to Count One. One alleged aggravating circumstance is to Count One, and two alleged aggravating circumstances as to Count Two. In arriving at your verdict in this case, you will consider all the mitigating circumstances as shown by the evidence in this case, and you may consider all the evidence of statutory aggravating circumstances. As I have stated, I will furnish you with this written list of aggravating circumstances which you are authorized to consider in this case.

Though you may find beyond a reasonable doubt that the State has proved the existence of an aggravating circumstance or circumstances, as the case may be, you would be authorized to recommend the Defendant to the mercy of the Court or to life imprisonment. They both mean the same thing,

recommending to the mercy of the Court or life imprisonment. You may make it arbitrarily as a matter of course or as a matter of discretion. The law does not by any of its terms, definitions or provisions seek to preclude you from giving consideration or acting upon or being motivated by anything that prompts you to impose a sentence less than death. If you see fit to provide a life sentence as punishment for the accused, even though you may have found aggravating circumstances to exist beyond a reasonable doubt, the form of your verdict would be, "We, the Jury, recommend life imprisonment." You may, if that be your verdict, and you should fix the penalty as to each one of the various counts, and you may if that be your verdict fix the penalty of death as to one count and life imprisonment as to the other count. That is a matter entirely for you to determine. You consider each count separately. If you recommend the Defendant to the mercy of the Court or if you fix his sentence to be life imprisonment, the Court would be required to sentence the Defendant to the penitentiary for and during the term of his natural life. If the State has failed to establish a statutory aggravating circumstance, or if you entertain a reasonable doubt as to his guilt of statutory aggravating circumstance, you should give him the benefit of the doubt and recommend life imprisonment.

Now, I have prepared for you a guide which you can use if you want to, Mr. Foreman, Ladies and Gentlemen of the Jury. I just have it up here, State versus Fred Marion Gilreath, Jr., Number 79-0924, Murder, Two Counts. As to Count Number One, We, the Jury, fix the punishment as follows. Now, you consider Count One and see if you find beyond a

reasonable doubt that this aggravating circumstance that is listed in A on the list of aggravating circumstances exists. If you find beyond a reasonable doubt and unanimously that that aggravating circumstance does exist, write it out. We find the following aggravating circumstances to exist.

All right. Then you can go down to Count Two and do the same thing. You determine whether or not one or more of the two aggravating circumstances listed as B and C exist. If you find that one of them exists, put in there: We find the following aggravating circumstances exist, and copy from this list. If you find both of them exist, that is, B and C, copy both of them. Now, you would go back, and even though you find that an aggravating circumstance exists as to Count One, you still can recommend him to the mercy of the Court or to life imprisonment, either way you write it out. It means the same thing, and if you do not, then if you find unanimously and beyond a reasonable doubt that the death sentence should be imposed, then you would write in there, and we recommend the death sentence as to Count One.

Then you come down here and I say--now, let me go back. If you don't find aggravating circumstances exist, then you would automatically just say, we fix the punishment at life imprisonment. You could not under any circumstances give the death penalty unless you find the aggravating circumstances beyond a reasonable doubt and unanimously.

Now, go down here to Count Number Two. If you find one or more of the aggravating circumstances do exist unanimously and beyond a reasonable doubt, there again then you would determine whether or not you recommend to the mercy of the Court or recommend life imprisonment or whether you

recommend the death penalty. Bear in mind that anything and everything that this Court has said, under no circumstances conceivable do you have to render a death penalty recommendation. Y'all understand that, so you go out now, consider whether these aggravating circumstances exist, and if they don't, just fix life imprisonment as to Count One and Two. If they exist as Count One, if aggravating circumstances exist as to Count One, then you determine whether it will be life imprisonment or a death penalty. Come down to Count Two. If there are no aggravating circumstances found to exist unanimously and beyond a reasonable doubt, then fix the sentence punishment at life. If you find one or more of those aggravating circumstances under Count Two listed as B and C in the notice of aggravating circumstances, then you would determine whether or not you would recommend them to the mercy of the Court or recommend a life sentence or whether you would recommend the death penalty. Do you understand?

[All twelve jurors nod heads affirmatively]

All right. You may go out and determine the punishment to be meted out as to Count One and Count Two. You may retire, Ladies and Gentlemen, and consider the verdict as to punishment.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81 5562
(A-175)

FRED MARION GILREATH, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Fred Marion Gilreath, Jr., by his counsel, respectfully moves this Court pursuant to Rule 46 for leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis.

Petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

John R. Hupper
One Chase Manhattan Plaza,
New York, N.Y. 10005

Counsel for Petitioner
Fred Marion Gilreath, Jr.

October 13, 1981

I hereby certify that on this 13th day of October, 1981, copies of this motion were mailed, postage prepaid, to Nicholas G. Dumich, Esq., 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334, and to Thomas J. Charron, Esq., District Attorney, Cobb Judicial Circuit, P.O. Box 649, Marietta, Georgia 30061. I further certify that all parties required to be served have been served.

Counsel for Petitioner

No. 81-5562

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

---

FRED MARION GILREATH, JR.

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

---

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
ON APPEAL IN FORMA PAUPERIS

---

I, FRED MARION GILREATH, JR., being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes_____ No ✓

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. May 1979 Doyletts Shoppes 800.00 mo

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes_____ No ✓

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes_____ No ✓

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes_____ No ✓

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None ✓
I have 2 minor children that are kept by in-laws

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Fred Marion Gilreath Jr
FRED MARION GILREATH, JR.

STATE OF GEORGIA
COUNTY OF _____

SUBSCRIBED AND SWORN TO
before me this the 27 day of July, 1981.
Aaron W. Rozemore

My Commission expires:
9-20-83

# Supplemental Brief

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No. 81-5562
(A-175)

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1981

FRED MARION GILREATH, JR.,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

# SUPPLEMENTAL BRIEF FOR PETITIONER

JOHN R. HUPPER,
One Chase Manhattan Plaza,
New York, N.Y. 10005
(212) 422-3000

Counsel for Petitioner

Of Counsel:

JEANNE EDNA THELWELL
STEPHEN M. BUNDY

CRAVATH, SWAINE & MOORE,
One Chase Manhattan Plaza,
New York, N.Y. 10005

January 28, 1982

Petitioner submits this brief pursuant to Rule 22.6 of this Court to address the impact of the Court's decision in Eddings v. Oklahoma, No. 80-5727 (decided January 19, 1982), upon the consideration of the Petition herein.

In Eddings, the Court reaffirmed two fundamental Constitutional principles governing sentencing in death penalty cases.

First, the statute under which the penalty is imposed must ensure that "'the sentencing authority is given adequate information and guidance'" in determining the appropriate sentence. Eddings v. Oklahoma, slip op. at 7 (citing Gregg v. Georgia, 428 U.S. 153, 195 (1976)). As we showed in the Petition, application of this principle requires that this Court reject the jury sentencing in petitioner's case as constitutionally inadequate. The language of Ga. Code § 27-2534.1(b)(7) does not provide the jury with the "specific and detailed guidance" needed to ensure that the death sentence will be imposed with "reasonable consistency", Eddings v. Oklahoma, supra, slip op. at 8, and the trial court, in charging the jury in the words of the statute, did not supply such guidance.

Second, the sentencing authority must consider "'the character and record of the individual defendant and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death'". Id. at 7-8 (citing Woodson v. North Carolina, 428 U.S. 280, 304 (1976)). See also Lockett v. Ohio, 438 U.S. 586, 606 (1978). Application of this principle requires rejection of any notion that appellate review of petitioner's death sentence in the Georgia Supreme Court

constituted an independent, constitutionally adequate sentencing proceeding which superseded the defective jury sentence.

It is absolutely clear from the record below that the review in the Georgia court did not involve the full consideration of mitigating evidence required by Woodson, Lockett and Eddings. Instead, it focused on three much narrower inquiries: whether the evidence, viewed in the light most favorable to the State, supported the jury's finding under § (b)(7), State v. Gilreath, A.40-41; whether the sentence was imposed under the influence of passion, prejudice or any arbitrary factor, id. at A.43; and whether there were any prior death sentence cases which--again viewed in the light most favorable to the State--were arguably comparable to petitioner's. Id. at A.43-44.

The first inquiry--sufficiency of the evidence--in its nature excluded consideration of "mitigating" factors. The court's focus was only on evidence which tended to support the jury's finding that the crime was "vile, horrible and inhuman". The second and third inquiries involved no more than a determination, based upon a review of the evidence below and a handful of "comparable" appellate cases, that the jury's decision to impose the death sentence could not be said to be wholly aberrant. Plainly, those limited inquiries fell far short of the independent sentencing judgment, based upon the character and record of the offender and the circumstances of the offense, which Eddings held to be "constitutionally indispensable". Indeed, all three inquiries reflect the traditional deference of an appellate court to the sentencing judgment in the trial court--a judgment rendered

in this case in the "uncontrolled discretion of a basically uninstructed jury". Godfrey v. Georgia, 446 U.S. 420, 429 (1980).

Under Eddings and this Court's prior opinions, petitioner was constitutionally entitled to be sentenced pursuant to precise legal standards and after full consideration of all relevant evidence in aggravation and mitigation. Because he has not received that opportunity either in the trial court or on appeal his sentence must be reversed.

## CONCLUSION

For the reasons stated above, in the Petition and in the Reply Brief, a writ of certiorari should issue to review the judgment and opinion of the Georgia Supreme Court.

Respectfully submitted,

JOHN R. HUPPER,
One Chase Manhattan Plaza,
New York, N.Y. 10005
(212) 422-3000

Counsel for Petitioner

Of Counsel:

JEANNE EDNA THELWELL
STEPHEN M. BUNDY

CRAVATH, SWAINE & MOORE,
One Chase Manhattan Plaza,
New York, N.Y. 10005

January 28, 1982

# Opposition

ORIGINAL

NO. ~~A-175~~

81-5562

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

FRED MARION GILREATH,
JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

# BRIEF FOR THE RESPONDENT IN OPPOSITION

NICHOLAS G. DUMICH
Attorney General
Counsel of Record for
the Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

NICHOLAS G. DUMICH
132 State Judicial Bldg.
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3499

## QUESTIONS PRESENTED

1.

Whether it was necessary for the trial court to give limiting and explanatory instructions relating to the punishment phase of Petitioner's trial in regard to Ga. Code Ann. § 27-2534.1(b)(7), and in the absence of said explanatory or limiting instructions, whether the Supreme Court of Georgia properly affirmed Petitioner's death sentence.

2.

Whether the existence of an additional, unchallenged statutory aggravating circumstance under Ga. Code Ann. § 27-2534.1 (b)(2), negates the need for a review of Petitioner's death penalty, since he is only challenging the trial court's instructions and Georgia Supreme Court review on Petitioner's death penalty based under Ga. Code Ann. § 27-2534.1(b)(7).

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## PART ONE

## STATEMENT OF THE CASE

Petitioner, Fred Marion Gilreath, Jr., was indicted on June 19, 1979 by the Cobb County, Georgia Grand Jury for the murders of Linda Van Leeuwen Gilreath and Gerrit Willem Van Leeuwen. (R. 608).[1/] Following a jury trial on February 25, 1980 through February 29, 1980, Petitioner was convicted of both murders. (R. 8; T. 1272).

During the sentencing phase of Petitioner's trial, the State proved the existence of two statutory aggravating circumstances under Ga. Code Ann. § 27-2534.1(b)(2) and (b)(7), and recommended the death penalty. (T. 1304-1305; R. 146).

The jury found that both the murder of Linda Gilreath and Gerit Van Leeuwen fit the (b)(7) aggravating circumstance. The jury found that both murders were outrageously and wantonly vile, horrible and inhuman in that they involved torture, depravity of mind and aggravated battery to the victim. Additionally, the jury found that the murder of Gerrit Van Leeuwen was committed while Petitioner had been engaged in the commission of another capital felony, to wit: the murder of Linda Gilreath. (Id.). Based upon the aforesaid findings by the jury the trial court, on March 3, 1980, sentenced Petitioner to death. (R. 144-145).

Following a hearing, Petitioner's motion for a new trial, as amended, was denied on October 6, 1980. (R. 210). On June 30, 1980 the Georgia Supreme Court affirmed Petitioner's convictions and sentences. Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981).

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1/ References to the pagination of the Record from the Superior Court of Cobb County, Georgia shall be referred to as (R. ___). References to the pagination of the transcript of Petitioner's trial in said Court shall be referred to as (T. ___).

Rehearing was denied on July 15, 1981.

Thereafter, this instant petition for a writ of certiorari was filed.

## PART TWO

## STATEMENT OF THE FACTS

As is noted in the Petitioner's brief, the record of Petitioner's trial in the Superior Court of Cobb County, Georgia is quite lengthy, covering approximately 1,500 pages. Since the only eyewitnesses to the murder were the victims and the Petitioner, the State was forced to rely upon circumstantial evidence; however, the facts presented at trial strongly and overwhelmingly pointed to his guilt.

On May 11, 1979, at approximately 4:45 p.m., Mr. Dempsey Wolfenbarger approached Corporal J. E. Davis of the Cobb County, Georgia Police Department and advised Corporal Davis that he was concerned for the safety of his stepdaughter, Linda Gilreath. Linda Gilreath and the Petitioner were in the process of obtaining a divorce, and several days previously, Linda had left the house she and her husband had shared to stay with her mother and her stepfather, Dempsey Wolfenbarger. (T. 338-339, 375). The domestic problems between Petitioner and Linda Gilreath centered around Linda's working hours and the Petitioner's unemployment. (T. 448, 1070). In the early hours of the morning on Tuseday, May 8, 1979 the Petitioner had denied Linda Gilreath access to her home. (T. 1072). That night, Linda was forced to sleep in her white Crysler Cordoba in a Cobb County park. (T. 419-425). Inquiries made to the Petitioner by Linda's mother and by a friend, Shirley Harrell, the following day as to Linda's whereabouts yielded no answers. (T. 340, 450).

Petitioner stated that he was not concerned with Linda's whereabouts and that, "he was through - she had made her bed." (T. 450, 451). Consequently, Linda Gilreath moved to her mother's residence. (T. 451). On Thursday, May 10, 1979, the Petitioner came to the Wofenbarger's house trailer, but Linda told Petitioner not to enter the residence. The Petitioner left stating, "The war has started now." (T. 342). Later that day, Linda and her friend, Shirley, drove the Gilreath children to Seneca, South Carolina to stay with Linda's sister. (T. 453).

The next day, on May 11, 1979, Linda filed a petition for divorce. (T. 469). At approximately 12:00 p.m. that same day Gerrit Van Leeuwen (Linda's natural father, who had been living in a basement apartment with Linda and Petitioner) came to the Wolfenbarger trailer. He told Linda that Petitioner desired to see her to talk about the impending divorce. (T. 343). At approximately 1:30 p.m., Linda left with Gerrit Van Leeuwen for the Gilreath residence. At the time they were driving a blue, Plymouth Duster. (T. 344). The estimated approximate driving time from the Wolfenbarger trailer to the Gilreath residence was only ten minutes. (T. 344).

At approximately 2:30 p.m. on May 11, 1979 Ms. Wolfenbarger began telephoning the Gilreath residence, but she received no answer. After several attempts at calling, she telephoned Linda's friend, Shirley,and requested that Shirley pick up Mr. Wolfenbarger from work, because Linda had not returned. Accordingly, Ms. Wolfenbarger and Shirley Harrell proceeded to Mr. Wolfenbarger's place of business. (T. 344-345). On Ms. Harrell's way to the Wolfenbarger's at 3:15 p.m. and on her return home at 4:00 p.m. she had passed the Gilreath residence, but the only cars which she observed were a red Dodge truck and a gold Volkswagon. (T. 346, 456, 457). The Volkswagon belonged to Gerrit Van Leeuwen. (T. 341).

After Ms. Wolfenbarger learned from Shirley Harrell that the blue Duster was not at the residence, she became concerned and called Linda's attorney. Eventually she and Mr. Wolfenbarger decided to contact the police. (T. 346, 364).

It was at this point that Mr. Wolfenbarger traveled to the Cobb County Police Department and contacted Corporal Davis. (T. 375, 364). At Mr. Wolfenbarger's request, Cobb County police officers drove to the Gilreath residence and arrived at approximately 5:00 p.m. (T. 376). Upon arriving at the residence they discovered three vehicles parked on the premises: Mr. Van Leeuwen's gold Volkswagon, a red pickup truck,and behind the house a green Duster which was on blocks. (T. 378). The officers knocked on the door of the residence, but received no answer. Upon walking to the side of the house they noticed a strong, pungent odor of gasoline. (T. 377-379, 413-414). Upon further investigation the officers discovered the bodies of Linda Gilreath and Gerrit Van Leeuwen. Linda was found shot to death, lying on the floor between a coffee table and a love seat in the living room. (T. 801). Atop her disfigured face was a pink towel. (T. 799). Close behind her was a suitcase containing some of her clothing. (T. 786). She had been shot five times along the right side of her body with a .30-.30 caliber, lever action rifle from an approximate distance of 2 to 3 feet. (T. 637, 905, 906, 913). Her face had been shot from an approximate distance of 5 to 6 feet with a .12 guage shotgun. (T. 905, 912). Portions of Linda's face and head were splattered across the carpet and love seat. (T. 799, 802, 943). Mr. Van Leeuwen was found lying a short distance from Linda. (T. 787). He suffered a .30-.30 caliber wound to his right thigh, a shotgun wound to his left chest, and two .22 caliber wounds in his head. (T. 634, 914, 915-916).

The investigating officers found gasoline which had been poured on and around the two victims, as well as in the adjacent living room area and in puddles on the kitchen floor. (T. 787, 897). Mr. Van Leeuwen's body was marked by skin slippage (a blistering effect), indicative of a reaction to the caustic gasoline. (T. 916). Had no precautions been taken by the police, an explosion and fire might have occurred. (T. 768).

Investigating officers recovered numerous shell casings from a .22 caliber weapon, a .30-.30 caliber weapon and a .12 guage shotgun. (T. 788-791). The .22 caliber rifle was found lying across the bathroom sink, and the shotgun was found next to the front door. (T. 787). Of particular interest was the fact that four of the .30-.30 caliber shell casings were found in a red ashtray in the kitchen. Two of the casings were casually strewn in the ashtray; however, the other two had been neatly stacked one atop the other and placed in one of the shotgun shells. (T. 789, 1377). Also found in the ashtray was a Merit brand cigarette, the kind smoked by the Petitioner. (T. 660). Petitioner also maintained a .22 caliber rifle, a .12 guage shotgun and a .30-.30 caliber rifle in his home, and he acknowledged at the trial that the two weapons established as the death weapons, and found at the crime scene, belonged to him. (T. 611-623).

Located outside of the home was a large, green gasoline can which had previously been given to the Petitioner by Mr. Wolfenbarger. (T. 366, 786). Police also observed no signs of forcible entry or theft anywhere in or around the house. (T. 785).

The police investigation led authorities to Hendersonville, North Carolina. (T. 811). The Petitioner had arrived at his brother's place of business in Hendersonville at approximately 7:30 p.m. on the same day as the murder. (T. 604-607). When he arrived in North Carolina, Petitioner was driving the blue Plymouth Duster. (T. 654). After entering his brother's place of business, Petitioner curiously decided to shower while fully clothed. (T. 658). The shorts which Petitioner had been wearing were subsequently recovered, and a spot upon them suggested the presence of blood. (T. 615-659, 674). After Petitioner arrived in North Carolina, his brother notified the Hendersonville Sheriff's Department, because he had previously been told by the Sheriff that a lookout had been placed for Petitioner and the blue Plymouth Duster. (T. 653, 667). The Hendersonville Sheriff's Department had been notified of the lookout by the Cobb County Police Department. (T. 651).

When Cobb County Police arrived in North Carolina the next day, they secured from Petitioner's car a box of Federal .22 caliber short bullets, the same type as those which had inflicted the head wounds upon Mr. Van Leeuwen. (T. 633-634, 813). Some .30-.30 caliber shell casings found along the driveway of a mountain cabin owned by Petitioner, were subsequently identified as having originated from the same weapon as that which fired the .30-.30 caliber shell casings found at the crime scene. (T. 636-638).

During the course of the police investigation in Georgia, one of Petitioner's neighbors Larry Turner was interviewed. He stated that he had heard shots coming from the Gilreath residence between 1:30 and 2:30 p.m. (T. 476-478). This neighbor also told police that he noticed an excessive amount of water in the street that particular day, and this seemed unusual,

because it had not rained. (T. 484-485).

This information led police officers to contact the Cobb County, Georgia Water Department. (T. 832). The Water Department had dispatched workers to a hydrant approximately 200 feet from the Petitioner's residence. The workers arrived at approximately 1:40 p.m. and departed at 1:50 p.m. During this time period, the crew foreman had heard five shots coming from the direction of the Petitioner's residence. (T. 504, 506, 507). He also had observed a Volkswagon in the driveway of the residence. (T. 512). Another worker recalled that after having arrived at the residence, he noticed a blue car parked in the driveway. He subsequently identified the automobile as Linda Gilreath's blue, Plymouth Duster. (T. 523, 526). The worker also observed an elderly man walking around the side of the house toward the porch area. (T. 524). Moments later, the workmen heard five shots fired in rapid succession from the direction of the house. (T. 525). The workers observed the blue Duster still in the driveway when they left the area. (T. 526).

Another one of the workmen testified that he observed the blue Duster entering the driveway of the residence. (T. 545-547, 550). This workman also observed an elderly gentleman and a woman walking towards the rear of the house, and approximately a minute later he heard gunfire. (T. 545-548). At the time the shots were fired the blue Plymouth Duster was still parked in the Gilreath driveway, and shortly after hearing the shots the workers departed from the scene. (T. 550).

During the course of the investigation, the Cobb County Police contacted Dr. Joseph Burton, Medical Examiner and crime scene expert, who was able to reconstruct the incident at the crime scene in the following manner:

The angle of the wounds inflicted upon Linda Gilreath and the location of her body indicated that she was shot five times with a .30-.30 caliber lever action rifle while she was attempting to flee from the sofa upon which she was seated. The impact of the bullets caused her body to rotate up and backwards against the love seat, throwing her side around. As the bullets passed through her organs, she dropped back onto the sofa and fell forward. As she fell forward, her shoulder moved closer to the assailant, thus accounting for the fact that the shoulder wound was inflicted at a closer range than any other wounds. Two bullets exited her body and passed into the back of the love seat and wall. Because the gun was lever action, the assailant had to eject one shell after another. Though these wounds were fatal, they may not have caused death instantly. At some point, Linda slumped back on the sofa long enough for blood to soak into a newspaper which was lying there. (T. 933-937).

Dr. Burton theorized that Mr. Leeuwen was shot with the .30-.30 caliber rifle as he entered the room through the sliding glass door. The position of the bullet and bone fragments recovered from a wall at the scene supported this theory. The wound would have cause Mr. Van Leeuwen to immediately collapse. As he fell forward, his blood stained the carpet. (T. 937-940). The initial wounds inflicted on Mr. Van Leeuwen would not have killed him instantly. (T. 940).

It is apparent that the Petitioner then retrieved the shotgun which was usually kept behind the front door of the residence, and shot Mr. Van Leeuwen as be braced himself on the coffee table before him. Petitioner then took another step forward and shot across the coffee table into the face of Linda Gilreath. This knocked her to the floor. Fragments of bone and brain tissue were present on the counch and on the floor. (T. 940-943).

At this point, Dr. Burton theorized that Mr. Van Leeuwen was dying but was not dead. Petitioner then obtained a .22 caliber rifle and shot Mr. Van Leeuwen twice in the head at point blank range. At some time later, he poured gasoline over the two bodies. (T. 943-946).

Other evidence at the crime scene indicated that the Petitioner cleaned himself after the murders, gathered some of his shell casings, and even neatly stacked several in an ashtray. (T. 787, 1377). Additionally, at some point before leaving, he placed a towel across the mutilated face of Linda Gilreath. (T. 748).

In their efforts to trace the Petitioner's whereabouts on the murder date, police officers came into contact with David Bridges, who recalled seeing the Petitioner between 2:00 p.m. and 3:30 p.m at Statewide Beverages in Hapeville, Georgia. Petitioner was driving the blue Duster. (T. 712). Petitioner spoke briefly with Bridges, and drank a beer. Bridges testified that Petitioner appeared nervous and seemed eager to leave. (T. 713, 714).

At trial the Petitioner testified that on the day of the murder he had three drinks from a bottle of rum before leaving Mr. Van Leeuwen and Linda Gilreath at this home. He testified after leaving his car, he purchased a fifth of vodka and some beer, then after making a stop at Statewide Beverages, he left for North Carolina. (T. 1078-1079). On cross-examination he verified that when he reached Statewide Beverages he was not drunk. (T. 116). Prior to that time he had only two drinks at his house, and a boiler maker which he had made after purchasing the fifth of vodka. (See, T. 1104-1106). Of course, he completed his drive to North Carolina. (T. 604-607).

Petitioner maintained his innocence through the defense of alibi, stating he was not present at the scene when the shootings occurred. He did not assert that the killings were the result of an act of violent passion resulting from serious provocations by either of the victims. Nor did Petitioner claim that the killings occurred while his mental facilities had been diminished as a result of alcohol consumption.

As noted previously, the jury found the Petitioner guilty on both counts, and further found sufficient aggravating circumstances to support both death penalties.

Additional facts may be related in the following portion of this brief to more fully explain Respondent's position.

## PART THREE

## REASONS FOR NOT GRANTING THE WRIT

I. THE EXISTENCE OF AN ADDITIONAL, UNCHALLENGED AGGRAVATING CIRCUMSTANCE SUPPORTING PETITIONER'S DEATH PENALTY BESIDES THE AGGRAVATING CIRCUMSTANCE WHICH IS CHALLENGED IN THE INSTANT WRIT, NEGATES THE NEED FOR THIS COURT'S REVIEW OF PETITIONER'S DEATH PENALTY ON WRIT OF CERTIORARI.

As has been previously noted, the jury at Petitioner's trial recommended the imposition of the death penalty for both the murder of Linda Gilreath and also for the murder of Gerrit Van Leeuwen. The jury found that both murders had been outrageously and wantonly vile, horrible and inhuman in that they involved torture, depravity of mind and aggravated battery to the victims. Ga. Code Ann. § 27-2534.1(b)(7). The jury also found that as an additional aggravating circumstance, the murder of Gerrit Van Leeuwen had occurred while the Petitioner had been engaged in another capital felony, to wit: the murder of Linda Gilreath. Ga. Code Ann. § 27-2534.1(b)(2). (R. 146).

At this point, the Petitioner does not attack the sufficiency of the trial court's instructions or the jury's finding on the (b)(2) aggravating circumstance, but focuses upon the (b)(7) aggravating circumstance involved in each murder, and argues that if the (b)(7) aggravating circumstance was found to have been erroneously imposed, then as a matter of law, the case should be remanded for a new sentencing trial, because it would be unclear whether the jury may have recommended the death penatly for the Gerrit Van Leeuwen murder solely upon their findings of the (b)(2) aggravating circumstance and in the absence of their finding under (b)(7). A similar issue is now before this Court

in Zant v. Stephens, Case No. 81-89. See, Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), amended en banc 648 F.2d 446 (5th Cir. 1981); Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92 (1978), cert. den., 439 U.S. 991 (1978). Since the ruling in Zant v. Stephens, supra, may have a direct and immediate bearing upon the instant case, Respondent respectfully submits that the ultimate decision as to whether certiorari should be granted here, should be delayed until after the decision in Stephens, supra.

Of course, in addition to Stephens v. Hopper, supra, there are numerous other Georgia death penalty cases which hold that following a finding of two or more statutory aggravating circumstances supporting a death penalty, each of which having been established beyond a reasonable doubt, the death penalty should not be vacated because one of the statutory aggravating circumstances is later set aside. See e.g., Hamilton v. State, 246 Ga. 262 n. 1, 271 S.E.2d 173 (1981), cert. den., 446 U.S. 961, rehng. den., ___U.S.___, 101 S.Ct. 1530 (1981); Burger v. State, 245 Ga. 458, 460-461, 265 S.E.2d 796 (1980), cert. den., 446 U.S. 988 (1980); Dampier v. State, 245 Ga. 427, 883, n. 1, 265 S.E.2d 565 (1980), cert. den., 449 U.S. 938 (1980); Fair v. State, 245 Ga. 868, 880, n. 1, 268 S.E.2d 316 (1980), cert. den., ___U.S.___, 101 S.Ct. 407 (1980), rehng. den., ___U.S.___, 101 S.Ct. 903 (1981). Such rulings by the Georgia Supreme Court are in recognition of the mutual exclusiveness of the statutory aggravating circumstances listed under Ga. Code Ann. § 27-2534.1(b).

Here, following the guilt/innocence phase of the Petitioner's trial, neither party submitted additional evidence in aggravation or mitigation. Thus, the jury made its recommendations and findings based upon evidence that was properly admitted during

the guilt/innocence phase. Assuming arguendo an invalidation of the (b)(7) aggravating circumstance by this Court, the jury still would have had before it, all of the horrible facts and circumstances that supported its initial findings under (b)(7). The jury's recommendation for the death penalty was not, and need not have been based, solely upon the statutory aggravating circumstances, but was based upon all of the evidence before the jury both in aggravation and mitigation of punishment. The statutory aggravating circumstances, of course, are a prerequisite element which guides the jury's verdict; however, the jury may consider and may be ultimately swayed by other factors which it certainly is authorized to consider. Even if this Court finds the (b)(7) aggravating circumstance should be set aside as a result of the instructions given on same, absent the removal of some material piece of evidence in aggravation or mitigation of punishment which was considered by the jury, the setting aside of less than all of the statutory aggravating circumstances found by the jury beyond a reasonable doubt would have absolutely no effect on the process of jury deliberation in reaching or recommending an appropriate punishment.

Petitioner's reliance upon the principles announced in Stromberg v. California, 238 U.S. 359, 367-368 (1931) is erroneous. A review of Stomberg demonstrates that the jury in that case had returned a general verdict of guilty, which could have rested upon either of three grounds, one of which was clearly impermissible. Because the verdict returned was a general one, it was impossible to determine whether the jury's verdict rested upon the unconstitutional ground since the jury had been instructed in the disjunctive. Similar circumstances were also addressed in Bachellar v. Maryland, 397 U.S. 564, 570-571 (1970); Street v. New York, 394 U.S. 576, 585-588 (1969) and in Williams v. North Carolina, 317 U.S. 287, 291-292 (1942). All of these cases

involved general verdicts which had been returned by the juries, and where the record failed to disclose that the defendants' convictions had not been based upon a theory which could not support the verdict. Actually, there is language in Street v. New York, supra, which supports Respondent's argument that the existence of a separate, distinct and unchallenged aggravating circumstance found by the jury beyond a reasonable doubt, negates any need to grant certiorari to review Petitioner's case. In Street, this Court noted the danger recognized and addressed under the Stromberg principle is not relevant in a situation where the jury makes separate and distinct findings supporting their verdict.

> "There is no comparable hazard when the indictment or information is in several counts and the conviction is explicitly declared to rest on findings of guilt on certain of these counts, for in such instances there is positive evidence that the trier of fact considered each count on its own merits and separately from the others." Street v. New York, 394 U.S. at p. 588.

Thus, even if this Court should find that one of the statutory aggravating circumstances should be invalidated because of a technical omission in instructions and not because of the sufficiency of the evidence; nevertheless, this should not preclude the imposition of Petitioner's death penalty based upon another separate, independent statutory aggravating circumstance found to exist by the jury beyond a reasonable doubt. Since Petitioner may only be executed once, and since his sentence may be implemented pursuant to a second statutory aggravating circumstance not challenged in this proceeding, it is not

necessary for this Court to grant certiorari to review the issues which he raises pursuant to the statutory aggravating circumstance that he does challenge.

II. THE TRIAL COURT'S INSTRUCTIONS DURING THE SENTENCING PHASE OF PETITIONER'S TRIAL SUFFICIENTLY CHANNELLED THE JURY'S DISCRETION TO INSURE AGAINST THE NON-ARBITRARY APPLICATION OF THE DEATH PENALTY IN PETITIONER'S CASE.

Initially, it is important for this Court to recognize what Petitioner's case is not. The instant petition does not arise from Petitioner's conviction for a domestic murder committed in the heat of passion, following a violent family argument or while Petitioner was in a drunken stupor. Additionally, the instant case does not involve a situation where the Petitioner has shown any remorse,or where he has even admitted his guilt and has asked for forgiveness. Rather, to the contrary the facts as previously noted and recited by the Georgia Supreme Court demonstrate a planned, cold-blooded, double murder where the Petitioner had lured his victims into his home under the pretense of discussing a marital problem, and thereafter he methodically gunned them down, changing weapons at least three times during the course of his attack. Following the shootings, he had the presence of mind to flee to North Carolina and immediately shower with all of his clothes on to destroy any trace evidence which may have been contained on his clothing or on his body. It is in light of this factual situation, and in the context of the entire record that tne challenged jury instruction must be considered. See, United States v. Park, 421 U.S. 658, 674 (1975); Cupp v. Naughten, 414 U.S. 141, 147 (1973).

As this Court is well aware, Georgia's seventh statutory aggravating circumstance authorizes the jury to impose the death penalty when it finds beyond a reasonable doubt that, "The offense of murder . . . was outrageously vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Ga. Code Ann. § 27-2534.1 (b)(7).

The Georgia Supreme Court has recognized its obligation under the Georgia statutory provisions which mandate that it thoroughly review death sentences,[2/] and specifically with regard to Ga. Code Ann. § 27-2534.1(b)(7), it has stated that it has no intention of permitting that Code Section to become a "catchall" for cases simply because no other statutory aggravating circumstance has been raised by the evidence. Harris v. State, 237 Ga. 718, 730, 230 S.E.2d 1 (1976), cert. den., 431 U.S. 933 (1977). The Georgia Court further stated in Harris, its intention to restrict its approval of death sentences supported by Code Section 27-2534.1(b)(7) to those cases which lie not on the periphery of the statutory boundaries, but only to approve those sentences which are so outrageous and vile so as to lie at the core of the statutory intent. As the prior statement of facts amply demonstrates, the facts surrounding the murder of Linda Gilreath and Gerrit Van Leeuwen fall within the purview of Code Section 27-2534.1(b)(7) in that they demonstrate beyond all doubt the wanton, vile and inhuman nature of the murder, aggravated battery and torture to the victims and depravity of mind on the part of the Petitioner.

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2/ Under Ga. Code Ann. § 27-2537(c), the Georgia Supreme Court must review all death penalty cases to determine:

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (2) Whether in cases other than treason or aircraft highjacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 27-2534.1(b), and (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

In its review in this case, the Georgia Supreme Court made note that this was a domestic murder, and cited Tyler v. State, 247 Ga. 119, 126, 274 S.E.2d 549 (1981), where it was said, "Although lesser sentences than death are frequently imposed in domestic murder cases, it does not follow that the death penatly would not be authorized for the murder of one spouse by another under any circumstances." Citing, Dix v. State, 238 Ga. 209, 232 S.E.2d 47 (1977). The Georgia Supreme Court noted that some of the most vicious homicides have been perpetrated by family members against other family members, and the Court included that under the facts of this case, the death penalty was not excessive or disporportionate. A similar finding was also made by the Georgia Supreme Court recently in Godfrey v. State, ___Ga.____, ___S.E.2d ___ (Case No. 37683, 37684, November 24, 1981).

Here, the trial court instructed the jury on the statutory definition of the (b)(7) aggravating circumstance. In its opinion on direct appeal, the Georgia Supreme Court recognized that with the exception of the term "aggravated battery" the remainder of the terms contained under (b)(7) require no explication. The trial court did define the term "aggravated battery." Gilreath v. State, supra, 247 Ga. at p. 836; see also, Stevens v. State, 245 Ga. 583, 586, 266 S.E.2d 194 (1980), cert. den., ___U.S.___, 101 S.Ct. 251 (1980); Burger v. State, 245 Ga. 458, 462, 265 S.E.2d 796 (1980), cert. den., 446 U.S. 988 (1980). This holding by the Georgia Supreme Court was correct.

Of course, in a capital case jury discretion must be sufficiently guided so as to avoid the arbitrary and selective imposition of the death penatly. Furman v. Georgia, 408 U.S. 238 (1972). This Court in Gregg v. Georgia, 428 U.S. 153 (1976),

reviewed the Georgia statutory procedures for the imposition of the death penalty, and refused to declare the (b)(7) aggravating circumstance unconstitutionally vague, recogizing that the mandatory review by the Georgia Supreme Court could insure its constitutional application. Id., at p. 201. Here, the Georgia Supreme Court engaged in such a review, finding that the facts amply fit within the jury's finding under Code Section 27-2534.1(b)(7) in regards to both murders. Undoubtedly, Petitioner's case lies at the core and not at the periphery of the (b)(7) aggravating circumstance, and under such a situation, it should not be held that the trial court's failure to explain the specific terms contained therein operated to deprive Petitioner of any of his constitutional rights.

Since it is clear in the instant case that the statutory mandated procedures for the implementation of the death penalty were properly complied with, and that none of Petitioner's statutory or constitutional rights have been violated, this Court should refuse to grant certiorari to review the issues raised by Petitioner pertaining to the implementation of Petitioner's death penalty pursuant to Ga. Code Ann. § 27-2534.1(b)(7).

## CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests this Court to deny the petition for writ of certiorari filed on behalf of Fred Marion Gilreath, Jr.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

Marion O. Gordon

MARION O. GORDON
Senior Assistant Attorney General

John C. Walden

JOHN C. WALDEN
Senior Assistant Attorney General

Nicholas G. Dumich

NICHOLAS G. DUMICH
Assistant Attorney General

Please serve:

NICHOLAS G. DUMICH
132 State Judicial Bldg.
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3499

CERTIFICATE OF SERVICE

I, Nicholas G. Dumich, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for Respondent in opposition upon counsel for Petitioner by depositing a copy of same in the United States mail, with adequate postage attached thereto, and properly addressed to:

Mr. John R. Hupper
Attorney at Law
One Chase Manhattan Plaza
New York, New York 10005

This 15th day of December, 1981.

Nicholas G. Dumich

NICHOLAS G. DUMICH

# Petitioner's Reply Brief

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No. 81-5562
(A-175)

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1981

FRED MARION GILREATH, JR.,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

# REPLY BRIEF FOR PETITIONER

JOHN R. HUPPER,
One Chase Manhattan Plaza,
New York, N. Y. 10005
(212) 422-3000

Counsel for Petitioner

Of Counsel:

JEANNE EDNA THELWELL
STEPHEN M. BUNDY

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza,
New York, N. Y. 10005

January 6, 1982

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# REPLY BRIEF FOR PETITIONER

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## PRELIMINARY STATEMENT

This case presents two questions. The first is whether a general sentence of death based upon jury findings of more than one statutory aggravating circumstance can stand when one of those findings is determined to be invalid on Federal constitutional grounds. A substantially similar question is already before this Court in Zant v. Stephens, No. 81-89, which is scheduled to be argued later this Term. In our Petition, we suggested that this case should be held for disposition following the Court's decision in Zant v. Stephens. Petition at 33. Respondent has now joined in that suggestion.

or restrain the jury's sentencing discretion. Petition at 13-19. Second, as practiced by the Georgia Supreme Court, the process of sentencing review cannot and does not correct the constitutional failures of such instructions. Petition at 19-26. Both contentions were documented with extensive citation to, and analysis of, the statutory language and the reported decisions of the Georgia Supreme Court.

The State's Brief simply does not address the substance of either argument.

The State's sole answer to petitioner's criticism of the statutory language is to repeat the Georgia Supreme Court's assertion that, with the exception of "aggravated battery", the terms in § (b)(7) are "words of ordinary significance which require no explication". A. 37. Respondent's Brief at 16. As our Petition demonstrated, however, the Georgia court's statement is palpably unsupportable. There are numerous reported cases in which Georgia judges and juries plainly misunderstood and misapplied the "ordinary" language of § (b)(7). Moreover, as the Petition pointed out, the statutory definition of aggravated battery does not significantly limit the jury's sentencing discretion. Petition at 15-16. Respondent's Brief leaves these arguments wholly unrefuted.

In defense of the Georgia Supreme Court's sentencing review process, the State cites that court's statement in Harris v. State, 237 Ga. 718, 730, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933 (1977), that it would not allow § (b)(7) to become a "catchall" aggravating circumstance. Respondent's Brief at 16. But that statement of intention, however laudable at the time, must now be judged against dozens of subse-

quent reported decisions which plainly demonstrate (1) that Georgia prosecutors have in fact used § (b)(7) as a "catchall" in dubious cases, (2) that the Georgia Supreme Court has adopted a construction of § (b)(7) that covers the vast majority of homicide cases and (3) that the Georgia court has never yet reversed a § (b)(7) sentence for insufficiency of the evidence. Those decisions, which cannot be reconciled with the Harris court's statement, are nowhere addressed in the Respondent's Brief.

The State's failure to answer the Petition's analysis of the unconstitutional construction and application of § (b)(7) in the Georgia courts is particularly significant. In Gregg v. Georgia, 428 U.S. 153 (1976), this Court rejected an overbreath challenge to § (b)(7) because "there [was] no reason to assume that the Supreme Court of Georgia [would] adopt . . . an open-ended construction" of the statute. 428 U.S. at 201. That holding and the Court's subsequent decision in Godfrey v. Georgia, 446 U.S. 420 (1980), explicitly recognized that the constitutionality of § (b)(7) ultimately depends upon the care with which it is construed and applied in the Georgia courts. The Petition demonstrated that the Georgia courts have ignored those warnings, and the State is apparently without a response.

The constitutional failures of the Georgia system are not merely abstract or hypothetical. The Petition demonstrated, with extensive citation to the record below, that those failures materially prejudiced petitioner's position in the trial court and on appeal. In response to this demonstration, the State argues that there is no risk of arbitrariness in petitioner's case because the facts show a crime "at the

core and not at the periphery of the [§] (b)(7) aggravating circumstance". Respondent's Brief at 18. This argument is inaccurate as a matter of fact and incorrect as a matter of law.

The Respondent's notion that the record facts plainly dictated the imposition of the death penalty rests on selective citation of the evidence.* Petitioner had no prior criminal record. There was substantial evidence that petitioner was drunk on the day of the murders. Based on that evidence, the experienced trial judge in the matter advised the Georgia Supreme Court that in his opinion petitioner was "dog drunk" at the time of the crime, see Report of the Trial Judge, State v. Gilreath, at 4, and the jury may well have held the same view. There was also record evidence that petitioner had a history of irrational domestic violence, Tr. 1465-66, 1469, and that petitioner's wife had recently told him that she intended to seek a divorce. Tr. 343. This evidence of alcohol abuse, mental instability and domestic crisis scarcely suggests a carefully planned, cold blooded killing.

Given the presence of substantial mitigating evidence in the record, the State's position reduces to the contention that because some record evidence tends to support a finding of "aggravated battery" or "depravity of mind", this Court should view any error in the sentencing instructions as harmless. If accepted, this argument would render meaning-

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* In fact, the Respondent's presentation of the facts is significantly less balanced than that in the opinion of the Supreme Court of Georgia, and includes a number of prejudicial facts which that court apparently viewed as irrelevant to its sentencing review.

less all review of sentencing instructions in § (b)(7) cases, since, as this Court has noted, it is "arguable that any murder involves depravity of mind or an aggravated battery". Gregg v. Georgia, 428 U.S. 153, 201 (1976).* Contrary to Respondent's suggestion, to the extent that there was a conflict in the evidence on the issue of aggravation, it was especially important that the court's instructions provide the jury with the "clear and objective standards" for the exercise of its sentencing discretion required by this Court's opinions in Gregg and Godfrey. Because the jury did not receive such guidance, petitioner's death sentence cannot stand.

## CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Georgia Supreme Court.

Respectfully submitted,

JOHN R. HUPPER,
One Chase Manhattan Plaza,
New York, N. Y. 10005
(212) 422-3000

Counsel for Petitioner

Of Counsel:

JEANNE EDNA THELWELL
STEPHEN M. BUNDY

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza,
New York, N. Y. 10005

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* Respondent's argument is a further reflection of the hostility to the constitutional principle of guided jury discretion that is evidenced by its earlier suggestion that because "the jury would still have had before it, all of the horrible facts and circumstances that supported its initial findings under [§] (b)(7)", constitutional error in the § (b)(7) instructions should be viewed as harmless. Respondent's Brief at 13.